No. 99-391-CFX Title: Robin Free, et al., Petitioners
v.
Abbott Laboratories, Inc., et al.

Docketed: September 2, 1999 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Sep 1 1999	Petition for writ of certiorari filed. (Response due October 15, 1999)
	Sep 28 1999	Order extending time to file response to petition until October 15, 1999.
	Oct 15 1999	Brief of respondents Bristol-Myers Squibb Co., et al. in opposition filed.
	Oct 26 1999	Reply brief of petitioners Robin Free and Renee Free filed.
	Oct 27 1999	DISTRIBUTED. November 12, 1999
	Nov 19 1999	REDISTRIBUTED. November 24, 1999
	Nov 29 1999	Petition GRANTED. SET FOR ARGUMENT March 27, 2000. **********
	Jan 13 2000	Record filed.
	Jan 13 2000	Joint appendix filed.
	Jan 13 2000	Brief of petitioners Robin Free and Renee Free filed.
	Jan 13 2000	Brief amicus curiae of Louisiana filed.
	Jan 18 2000	Record filed.
	Jan 26 2000	CIRCULATED.
	Feb 11 2000	Brief amici curiae of Chamber of Commerce for the United States of America, et al. filed.
	Feb 11 2000	LODGING consisting of twenty copies each of two documents submitted by counsel for amici Chamber of Commerce and distributed.
	Feb 14 2000	Brief amicus curiae of Securities Industry Association filed.
	Feb 14 2000	Brief of respondent Abbott Laboratories filed.
	Feb 14 2000	Brief amicus curiae of Product Liability Advisory Council filed.
	Mar 15 2000	Reply brief of petitioners Robin Free and Renee Free filed.
	Mar 27 2000	ARGUED.

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No.

IN THE

Supreme Court of the United States

ROBIN FREE and RENEE FREE,

Petitioners,

v.

ABBOTT LABORATORIES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, overrules *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), and thus expands federal subject matter jurisdiction in a class action to encompass class members whose claims do not satisfy the amount-in-controversy requirement of 28 U.S.C. § 1332, as long as diversity jurisdiction exists over the claims of one named plaintiff.

PARTIES TO THE PROCEEDING

The Petitioners are Robin Free and Renee Free, plaintiffs in the action originally filed in Louisiana state court and removed by the respondents to federal district court.

The Respondents are the defendants in the action below: Abbott Laboratories, Bristol-Myers Squibb Company, and Mead Johnson & Company.

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Petitioners Robin Free and Renee Free respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit dated June 3, 1999 affirming the dismissal of Petitioners' case, and specifically to review the Fifth Circuit's ruling in this matter that 28 U.S.C. § 1367 overrules *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), and thus permits a federal district court sitting in diversity in a class action to exercise supplemental jurisdiction over class members whose claims do not satisfy the amount-in-controversy requirement. *Free v. Abbott Labs.*, 176 F.3d 298 (5th Cir. 1999), Appendix ("App.") A; *In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995), App. J. The Fifth and Seventh Circuits expressly disagree with the Tenth and Third Circuits whether *Zahn* remains good law; the district courts also are divided.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit reversing a remand order and holding that 28 U.S.C. § 1367 overrules *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), entered April 24, 1995, is reported at 51 F.3d 524 and is reprinted as Appendix J hereto. The Court of Appeals' denial of rehearing and rehearing en banc, entered September 1, 1995, is reported at 65 F.3d 33 and is reprinted as Appendix I hereto. The opinion of the Court of Appeals, entered January 19, 1999, declining to consider subject matter jurisdiction further on the basis of the law-of-the-case doctrine and certifying two questions of state antitrust law to the Louisiana Supreme Court, is reported at 164 F.3d 270 and is reprinted as Appendix C hereto. The order of the Louisiana Supreme Court denying certification of questions, entered March 19, 1999, is reported at 1999 WL 194425 and is reprinted as Appendix B hereto. The

opinion of the Court of Appeals, entered June 3, 1999, affirming dismissal on the merits, is reported at 176 F.3d 298 and is reprinted as Appendix A hereto.

The order of the United States District Court for the Middle District of Louisiana remanding to state court, entered April 5, 1994, is reported at 1994 U.S. Dist. LEXIS 4563 and is reprinted as Appendix L hereto. The order of the district court denying reconsideration of the remand order, entered June 21, 1994, is reported at 1994 WL 422298 and is reprinted as Appendix K hereto. The order of the district court preliminarily approving settlement and certifying a settlement class, entered May 31, 1996, is not reported and is reprinted as Appendix H hereto. The order of the district court denying final settlement approval, entered January 21, 1997, is reported at 953 F. Supp. 751 and is reprinted as Appendix G hereto. The order of the district court denying reconsideration of the denial of settlement approval, entered April 22, 1997, is not reported and is reprinted as Appendix F hereto. The order of the district court granting the defendants' motions to dismiss, entered November 6, 1997, is reported at 982 F. Supp. 1211 and is reprinted as Appendix D hereto. The Judgment of the district court dismissing the cause of action, entered November 7, 1997, is not reported and is reprinted as Appendix E hereto.

STATEMENT OF JURISDICTION

This petition for a writ of certiorari seeks review of the June 3, 1999 judgment of the United States Court of Appeals for the Fifth Circuit and the prior jurisdictional decision of that court dated April 24, 1995 on which the judgment is based. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES INVOLVED

28 U.S.C. § 1367 (1994) provides in part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

* * *

Portions of 28 U.S.C. §§ 1332 and 1441 are reprinted as Appendix M hereto.

STATEMENT OF THE CASE

Petitioners Robin and Renee Free are retail purchasers of infant formula. They filed a class action petition on October 14, 1993 in the Eighteenth Judicial District Court of the State of Louisiana against infant formula manufacturers Abbott Laboratories, Bristol-Myers Squibb Company, and Mead Johnson & Company. The Frees allege that the defendants conspired to raise the price of infant formula, in violation of the Louisiana antitrust statute and other state law; no federal claims are presented. 51 F.3d at 525, App. J at 77a. They claim that, as a result of defendants' conduct, retail purchasers of infant formula in Louisiana paid higher prices than they otherwise would have paid. The

petition seeks relief on behalf of themselves and a class of purchasers in an amount not to exceed $20,000 each. *Id.* at 526, App. J at 79a.

The defendants removed the case to the United States District Court for the Middle District of Louisiana, alleging diversity and federal question jurisdiction. The Frees moved for remand to Louisiana state court, arguing that neither their claims nor the claims of unnamed class members satisfied the then-applicable $50,000 amount-in-controversy requirement of diversity jurisdiction and that there was no federal question. The district court agreed there was no federal question jurisdiction and, after determining that the amount-in-controversy requirement was met for the Frees' claims due to their entitlement to attorney's fees as named plaintiffs, the district court held that 28 U.S.C. § 1367 allows supplemental jurisdiction over the unnamed class members, none of whose claims satisfy the amount-in-controversy requirement. 1994 U.S. Dist. LEXIS 4563, at *6-10, App. L at 104a. However, acting under Section 1367(c), the district court declined to exercise supplemental jurisdiction because the case presents novel issues of state law. *Id.* at *10-11, App. L at 104a-05a. With respect to the named plaintiffs, the district court declined jurisdiction under an abstention doctrine. 1994 WL 422298, at *2, App. K at 95a-97a.

Defendants took an interlocutory appeal of the remand order. The Frees again argued that their claims do not exceed the jurisdictional minimum and further that federal supplemental jurisdiction under 28 U.S.C. § 1367 does not encompass class members whose claims do not satisfy the jurisdictional minimum. The Fifth Circuit held that the Frees' claims satisfy the jurisdictional minimum because of their entitlement to attorney's fees. 51 F.3d at 527, App. I at 82a.

The Fifth Circuit then held that the line of cases culminating in *Zahn* was overruled by Section 1367 and therefore affirmed supplemental jurisdiction over unnamed class members even though their claims do not satisfy the jurisdictional minimum. *Id.* at 528-29, App. J at 89a. Finally, the court reversed the district court's decision to abstain with respect to the Frees' claims and held that to decline supplemental jurisdiction under Section 1367(c) with respect to unnamed class members was an abuse of discretion. *Id.* at 529-30, App. J at 90a-91a. In light of its holdings on diversity and supplemental jurisdiction, the Fifth Circuit declined to address the federal question issue. It denied rehearing and rehearing en banc. 65 F.3d at 33, App. I at 75a.

When the case returned to federal district court, two defendants moved to dismiss based on Louisiana antitrust law. Prior to a ruling on the motion, all defendants agreed to settle the case for $4.35 million. 953 F. Supp. at 752, App. G at 55a. The district court preliminarily approved the settlement and certified a settlement class. App. H. However, following notice to the class and a hearing, the court declined to grant final settlement approval. 953 F. Supp. at 756, App. G at 65a. Defendants moved for reconsideration of the denial of settlement approval but the district court denied the motion. App. F at 52a. The third defendant then joined the pending motion to dismiss. The district court ordered the case dismissed for failure to state a claim. 982 F. Supp. at 1218-19, App. D at 44a.

The Frees appealed and continued to assert the lack of federal subject matter jurisdiction because of failure to satisfy the amount-in-controversy requirement. On January 19, 1999, a new three-judge panel of the Fifth Circuit ruled that, under the law of the case doctrine, it would not consider

further the issue of subject matter jurisdiction. 164 F.3d at 272-73, App. C at 15a. The Court of Appeals then certified two questions of state antitrust law to the Louisiana Supreme Court. *Id.* at 276-77, App. C at 24a-25a. However, on March 19, 1999, the Louisiana Supreme Court denied certification. 1999 WL 194425, at *1, App. B at 9a. On June 3, 1999, the Fifth Circuit affirmed the district court's dismissal of plaintiffs' claims. 176 F.3d at 301, App. A at 8a.

REASONS FOR GRANTING THE WRIT

This Court has consistently required, in diversity cases, that the claims of each plaintiff satisfy the jurisdictional minimum set forth in 28 U.S.C. § 1332 (1994). The Court has applied this principle in a class action where some class members satisfied the minimum and others did not. *Zahn v. International Paper Co.*, 414 U.S. 291, 300 (1973) ("any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims"). It also has applied the principle in a class action in which no plaintiff satisfied the minimum and the class members sought to aggregate their claims. *Snyder v. Harris*, 394 U.S. 332, 335 (1969) ("The traditional judicial interpretation under all of these [diversity jurisdiction] statutes has been from the beginning that the separate and distinct claims of two or more plaintiffs cannot be aggregated in order to satisfy the jurisdictional amount requirement."). And, the Court always has applied the same principle in non-class actions where one plaintiff satisfied the jurisdictional minimum but another plaintiff did not. *See, e.g., Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589 (1939). This principle requiring the claims of each plaintiff to satisfy the jurisdictional minimum (referred to herein as "the *Zahn* principle") is firmly rooted in case law dating to 1832. *Zahn*,

414 U.S. at 515 & n.3 (citing *Oliver v. Alexander*, 31 U.S. (6 Pet.) 143 (1832)).

I.

THE CIRCUITS EXPRESSLY DISAGREE WHETHER THE SUPPLEMENTAL JURISDICTION STATUTE ELIMINATES OR PRESERVES THE RULE IN DIVERSITY CASES THAT THE CLAIMS OF EACH PLAINTIFF MUST SATISFY THE JURISDICTIONAL MINIMUM.

The Court of Appeals' decision in this case has been followed by the Seventh Circuit but expressly rejected by the Tenth and Third Circuits. Here, the Court of Appeals held that the supplemental jurisdiction statute, 28 U.S.C. § 1367, overrules the *Zahn* principle. According to the Court of Appeals, "under § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement, as did the class representatives." *In re Abbott Labs.*, 51 F.3d 524, 529 (5th Cir. 1995), App. J at 89a. The Seventh Circuit has followed this holding. *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930 (7th Cir. 1996) ("We follow Abbott Laboratories, which has strong support from the statutory text."); *In re Brand Name Prescr. Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997) ("At least one named plaintiff must satisfy the jurisdictional minimum. If he does, the other named plaintiffs and the unnamed class members can, by virtue of the supplemental jurisdiction conferred on the federal district courts by 28 U.S.C. § 1367, piggyback on that plaintiff's claim.").

However, in *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640 (10th Cir. 1998), the Tenth Circuit concluded that

"a literal and textually faithful reading of § 1367(a) leads to the opposite conclusion from that of the Fifth and Seventh Circuits" and held that each plaintiff must satisfy the jurisdictional minimum. The Third Circuit also disagreed with the Fifth and Seventh Circuits in *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999), in which it held that Section 1367 "preserves the prohibition against aggregation outlined in *Zahn v. International Paper Co.* and *Clark v. Paul Gray, Inc.*, and thus maintains the traditional rules governing diversity of citizenship and the amount-in-controversy under 28 U.S.C. § 1332." *See also Casteel v. Sara Lee Corp.*, No. Civ. 99-40117, 1999 WL 382375, at *6 (E.D. Mich. June 7, 1999) ("This Court duly notes that the circuits are in disagreement on the issue of whether 28 U.S.C. § 1367 overrules *Zahn*.").

These circuit cases reached opposite conclusions because they took different meanings from the text of Section 1367 and applied different methods of statutory interpretation. To reach its result in this case, the Fifth Circuit analyzed Section 1367 and found it neither unclear nor ambiguous:

> The statute's first section vests federal courts with the power to hear supplemental claims generally, subject to limited exceptions set forth in the statute's second section. Class actions are not among the enumerated exceptions.

In re Abbott Labs., 51 F.3d at 528, App. J at 87a. While acknowledging that the legislative history cites *Zahn* as a case "untouched by the Act," the Fifth Circuit held that "[w]e cannot search legislative history for congressional intent unless we find the statute unclear or ambiguous" and "[h]ere it is neither." *Id.* The court also noted that the omission of

class actions from the list of exceptions in § 1367(b) "may have been a clerical error," but held that "the statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result." *Id.* at 528-29, App. J at 87a-88a. Finding that overruling this Court's decision in *Zahn* would not be an absurd result, the court held there is supplemental jurisdiction over class members whose claims do not satisfy the jurisdictional minimum.

Following the Fifth Circuit's lead, the Seventh Circuit in *Stromberg* stated "we are reluctant to create a conflict among circuits on a jurisdictional issue" and agreed with the Fifth Circuit's reading of Section 1367. *Stromberg*, 77 F.3d at 930. In *Stromberg*, two plaintiffs asserted diversity jurisdiction but only one of them presented claims satisfying the jurisdictional minimum. The court held there was supplemental jurisdiction. In *Brand Name Prescription Drugs*, defendants in a class action alleging violations of state antitrust law removed the case from state court; plaintiffs argued the case should have been remanded for failure to satisfy the jurisdictional amount. Based upon *Abbott* and *Stromberg*, the Seventh Circuit held that as long as one named plaintiff satisfied the jurisdictional minimum, the other named plaintiffs and unnamed class members could "piggyback" by virtue of the supplemental jurisdiction statute "even though their own claims are for less than the jurisdictional minimum amount." *In re Brand Name Prescr. Drugs Antitrust Litig.*, 123 F.3d at 607. Finding no plaintiff satisfied the jurisdictional amount, the court ordered a remand of the case to state court.

In *Leonhardt* (the Tenth Circuit case rejecting the holdings of the Fifth and Seventh Circuits), a class action was brought that initially presented both federal and state

claims. Following dismissal of the federal claims, the district court held there was no supplemental jurisdiction over the state-law claims because only one plaintiff's claim satisfied the jurisdictional minimum. The Tenth Circuit affirmed, reasoning that the other circuits had wrongly focused on the absence of Fed. R. Civ. P. 23 from the exceptions listed in Section 1367(b):

> Those exceptions, however, concern only the exercise of supplemental jurisdiction over claims against defendants who are made parties to a diversity action under certain rules and claims by plaintiffs who seek to be added to an on-going diversity action. We are concerned, however, with whether Congress intended to change the rules about when a plaintiff can bring an initial diversity-based class action under Rule 23, where the court's original jurisdiction is based upon § 1332. The omission of Rule 23 from § 1367(b) has no bearing on that question.

Leonhardt, 160 F.3d at 639-40 (footnote omitted). Further, because Section 1367 commences by addressing "any civil action of which the district courts have original jurisdiction," the Tenth Circuit concluded that the statute expressly preserves the well-accepted rules of original jurisdiction, including the *Zahn* principle. *Id.* at 640. The Tenth Circuit stated:

> Thus, in our view § 1367(a) and (b) can be read literally, and unambiguously, to require each plaintiff in a class action diversity case to satisfy the *Zahn* definition of "matter in controversy" and to individually meet the $75,000 requirement.

Id. Finally, the court held that even assuming the statute was ambiguous, legislative history supported the court's interpretation because the House Judiciary Committee Report specifically referred to *Zahn* as a jurisdictional requirement undisturbed by the statute. *Id.* at 640-41.

In *Meritcare* (the Third Circuit case rejecting the holdings of the Fifth and Seventh Circuits), defendants removed a case based on diversity. It later became apparent that one plaintiff's claim satisfied the jurisdictional minimum under 28 U.S.C. § 1332 but a co-plaintiff's claim did not. After noting the circuit split, *id.* at 221 ("[t]he Court of Appeals for the Tenth Circuit, however, did not hesitate to take issue with both *Abbott* and *Stromberg*"), the court held Section 1367 to be ambiguous and therefore that resort to legislative history was appropriate. *Id.* at 222 ("we conclude that there is sufficient ambiguity in the statute to make resort to legislative history appropriate"). Further, the court held that reference to legislative history was appropriate even were it to conclude that Section 1367 was unambiguous because this was a rare case in which " 'the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters.' " *Id.* (*quoting United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)).

The Third Circuit reviewed the legislative history and observed that a House Judiciary Committee Report "flatly states that *Zahn*'s validity was not to be affected," *id.* at 220. It concluded:

> Our review of the text, legislative history, and origins of Section 1367 leads us to hold that it preserves the prohibition against aggregation outlined in *Zahn v. International Paper Co.* and *Clark v. Paul Gray, Inc.*, and thus maintains the traditional rules governing diversity of citizenship and the amount-in-controversy under 28 U.S.C. § 1332.

Id. at 222. The court ordered a remand to state court.

In short, faced with the question whether 28 U.S.C. § 1367 abrogates the *Zahn* principle, the Fifth and Seventh Circuits have answered "yes," and the Tenth and Third Circuits have answered "no." Two circuits hold the statute unambiguously overrules *Zahn*, one circuit holds the statute unambiguously does not overrule *Zahn*, and one circuit finds the statute to be ambiguous and therefore looks to the legislative history to hold the statute does not overrule *Zahn*. The district courts also are split, with the large majority adhering to *Zahn*.[1] One district court in the Seventh Circuit

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1. For cases holding that Section 1367 does not overrule *Zahn*, *see Allendale Mut. Life Ins. Co. v. Excess Ins. Co.*, No. 95 Civ. 10970 (SAS), 1999 WL 608788, at *14 (S.D.N.Y. Aug. 12, 1999); *City and County of San Francisco v. Hartford Life Ins. Co.*, No. C 99-0225 CRB ARB, 1999 WL 354522, at *5 (N.D. Cal. May 17, 1999); *Kanter v. Warner-Lambert Co.*, No. C99-1154 FMS, 1999 WL 390839, at *4 (N.D. Cal. June 9, 1999); *Casteel v. Sara Lee Corp.*, No. Civ. 99-40117, 1999 WL 382375, at *6 (E.D. Mich. June 7, 1999); *Universal Jewelry & Watch Repair, Inc. v. United Parcel Serv., Inc.*, No. 99-70016, 1999 U.S. Dist. LEXIS 5957, at *6-7 & n.2 (E.D. Mich. April 12, 1999); *Daniels v. Philip Morris Cos.*, 18 F. Supp. 2d 1110, 1114 (S.D. Cal. 1998); *Crosby v. America Online, Inc.*, 967 F. Supp. 257, 263 (N.D. Ohio 1997); *Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. 808, 819-20 (E.D. Pa. 1997); *McGowan v. Cadbury Schweppes, PLC*, 941 F. Supp. 344, 347-48 (S.D.N.Y. 1996); *Bernard v. Gerber Food Prods. Co.*, 938 F. Supp. 218, 224 (S.D.N.Y. 1996); *Blair v. Source One Mortgage Servs.* (Cont'd)

has openly registered its dissatisfaction with *Stromberg* and stated that the meaning of Section 1367 "may in time occupy the Supreme Court." *In re Amino Acid Lysine Antitrust Litig.*, 918 F. Supp. 1181, 1189 (N.D. Ill. 1996). The treatises are also split on the meaning of Section 1367,[2] as are the

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Corp., 925 F. Supp. 617, 622-24 (D. Minn. 1996); *Snider v. Stimson Lumber Co.*, 914 F. Supp. 388, 389-92 (E.D. Cal. 1996); *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 716-17 (C.D. Cal. 1995); *Waters v. Grosfeld*, 904 F. Supp. 616, 620 (E.D. Mich. 1995); *Shelly v. Southern Bell Tel. & Tel. Co.*, 873 F. Supp. 613, 616 (M.D. Ala. 1995); *In re Potash Antitrust Litig.*, 866 F. Supp. 406, 413 (D. Minn. 1994); *Benfield v. Mocatta Metals Corp.*, No. 91 Civ. 8255, 1993 WL 148978, at *4 (S.D.N.Y. May 5, 1993); *Hairston v. Home Loan and Inv. Bank*, 814 F. Supp. 180, 181 n.1 (D. Mass 1993); *Mayo v. Key Fin. Serv., Inc.*, 812 F. Supp. 277, 278 (D. Mass. 1993); *Averdick v. Republic Fin. Serv., Inc.*, 803 F. Supp. 37, 45-46 (E.D. Ky. 1992), *overruled on other grounds by Page v. City of Southfield*, 45 F.3d 128, 132-33 (6th Cir. 1995).

For cases holding that Section 1367 does overrule *Zahn*, *see Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 60 (D. Mass. 1997); *Leszczynski v. Allianz Ins.*, 176 F.R.D. 659, 666 (S.D. Fla. 1997); *Howard v. Globe Life Ins. Co.*, 973 F. Supp. 1412, 1415-16 (N.D. Fla. 1996); *Gilmer v. Walt Disney Co.*, 915 F. Supp. 1001, 1010 (W.D. Ark. 1996).

Additional district court decisions from the Third, Fifth, Seventh and Tenth Circuits were divided within and between circuits prior to the appellate decisions in those circuits. *See In re Abbott Labs.*, 51 F.3d at 528 n.8, App. J at 85a-86a (citing cases); *Borgeson*, 909 F. Supp. at 715-16 & nn.11, 12 (same); *In re Potash Antitrust Litig.*, 866 F. Supp. at 413 (same); 13 Charles Alan Wright, *et al.*, Federal Practice & Procedure § 3523.1 nn.65, 74 (1999 Supp.) (same).

2. *Compare* 5 James Wm. Moore et al., Moore's Federal Practice § 23.07[3][c] (3d ed. 1998) ("The conclusion that *Zahn*

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commentators, who have engaged in an unusually sharp exchange on the meaning of Section 1367.[3] A commentator

(Cont'd)

remains good law is ultimately unconvincing . . ."); *and* 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 6.11 (3d ed. 1992) ("The Act's probable overruling of *Zahn* is fully consistent with the reasoning of the Federal Courts Study Committee on whose recommendation the Act was adopted."); *with* 13 Charles Alan Wright, *et al.*, Federal Practice & Procedure § 3523.1 (1999 Supp.) ("The omission of any debate in the statute's history on the merits of this important change, one that would run counter to the stated purpose of Section 1367, makes the omission of the Rule 23 from Section 1367(b) seem more like an inadvertent mistake than a purposeful policy choice by Congress.") (quotation omitted). *See also Meritcare*, 166 F.3d at 220 n.5 (noting disagreement among treatises).

3. *See, e.g.*, Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute*, 28 U.S.C. § 1367, 19 Seton Hall Legis. J. 157 (1994); Thomas M. Mengler, *et al.*, *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 Judicature 213, 215 (1991) ("the Supreme Court's holdings that . . . all class members must satisfy the amount-in-controversy requirement remain good decisional law."); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 Emory L.J. 445, 471 (1991) ("the statutory language overrules *Zahn*"); Thomas D. Rowe, Jr., *et al.*, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 Emory L.J. 943. 944-45 (1991) ("Professor Freer purports to separate the wheat from the chaff and then proceeds to torch the farm."); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 Emory L.J. 963, 963 (1991) ("If Professor Freer in fact torched the entire farm, it is because there was so much dry straw lying around after the three drafters finished tilting with the strawmen they created in their response to Professor Freer's article.").

who contends the statute is ambiguous has observed that "it will take a Supreme Court decision to straighten out this mess." Arthur & Freer, Grasping at Burnt Straws, *supra*, at 981.

The split in the circuit and district courts is express and irreconcilable. Either the principle of *Zahn* survives enactment of Section 1367 or it does not. Without a ruling from this Court, litigants will continue to engage in protracted, unproductive battles over a basic question of jurisdiction. As is clear from the numerous district court decisions addressing the question presented, the uncertainty is now resulting in the wasteful expenditure of resources by both courts and litigants on a fundamental issue of federal jurisdiction. *Cf. Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980) ("litigation over whether the case is in the right court is essentially a waste of time and resources") (quotation omitted); *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) ("clear bright-line" jurisdictional rule "ensures that judges and litigants will not waste their resources in determining the extent of federal subject matter jurisdiction.") (Thomas, J., concurring in the judgment). A ruling by this Court would stop this wasteful litigation.

II.

THE COURT OF APPEALS' DECISION RAISES FEDERALISM CONCERNS AND SIGNIFICANTLY EXPANDS FEDERAL JURISDICTION IN DIVERSITY CASES.

Under the rule adopted by the Fifth and Seventh Circuits and some district courts, a state-law claim now may be brought in or removed to federal court even though it does

not satisfy the jurisdictional minimum for diversity jurisdiction as long as diversity jurisdiction exists over another plaintiff's claim. Where, as here, at least one named plaintiff in a class action is held to have satisfied the jurisdictional minimum, the case can encompass the state-law claims of hundreds of thousands of class members even though the amount of each claim is only a few dollars.

Whether to interpret a federal jurisdiction statute broadly or narrowly implicates serious federalism concerns: "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 292 U.S. 263, 270 (1934), *quoted in Snyder v. Harris*, 394 U.S. 332, 340 (1969) (class members cannot aggregate claims to meet diversity jurisdictional minimum); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (federal court jurisdiction is limited and "it is to be presumed that a cause lies outside this limited jurisdiction" unless the party asserting jurisdiction establishes the contrary). The holding of the Fifth and Seventh Circuits that Section 1367 overrules *Zahn* results in federal courts adjudicating significantly more state-law claims, an encroachment upon the States' traditional role in the federal system. *Compare Free v. Abbott Labs.*, 176 F.3d 298 (5th Cir. 1999), App. A at 8a (federal court holding in a case of first impression that state antitrust statute does not provide a cause of action to indirect purchasers of infant formula) *with Hyde v. Abbott Labs., Inc.*, 473 S.E.2d 680, 688 (N.C. Ct. App. 1996) (state court holding that state antitrust statute does provide a cause of action to indirect purchasers of infant formula). By contrast, the holding of the Tenth and Third Circuits that *Zahn* is not overruled respects the States' role in determining

state-law issues except where Congress has specifically and clearly authorized federal jurisdiction.

Further, the Court of Appeals' decision in this matter significantly shifts to federal courts state-law claims that do not satisfy the jurisdictional minimum. The Seventh Circuit in *Stromberg* conceded that its interpretation of Section 1367 greatly expanded the federal caseload, but felt constrained by its reading of the statute's text. *See Stromberg*, 77 F.3d at 931 (overruling *Zahn* allows "thousands of small claims into federal court via the class device"). The federal district courts have expressed concern at the Court of Appeals' holding that *Zahn* is overruled due to the holding's substantial impact on their resources. *See, e.g., Daniels v. Philip Morris Cos.*, 18 F. Supp. 2d 1110, 1114 (S.D. Cal. 1998) ("A disavowal of *Zahn* would have profound implications for district courts."); *Allendale Mut. Life Ins. Co. v. Excess Ins. Co.*, No. 95 Civ. 10970 (SAS), 1999 WL 608788, at *14 (S.D.N.Y. Aug. 12, 1999) ("Nor do I believe it advisable to allow such aggregation in light of the demands upon federal judicial resources already stemming from diversity actions."). This Court, in adhering to the rule that the claims of each plaintiff must satisfy the jurisdictional minimum, has observed that a contrary rule would greatly increase the number of state-law cases in federal courts:

> To overrule the aggregation doctrine at this late date would run counter to the congressional purpose in steadily increasing through the years the jurisdictional amount requirement. That purpose was to check, to some degree, the rising caseload of the federal courts, especially with regard to the federal courts' diversity of citizenship jurisdiction. . . . [Overruling the aggregation doctrine] would seriously undercut the purpose of the jurisdictional amount requirement. The expansion of the federal caseload could be most noticeable in class actions brought on the basis of diversity of citizenship.

Snyder v. Harris, 394 U.S. 332, 339-40 (1969), *quoted in Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. 808, 812-13 (E.D. Pa. 1997) (Section 1367 does not overrule *Zahn*) (Pollak, J.).

Not only has the holding of the Fifth and Seventh Circuits extended federal jurisdiction to plaintiffs whose claims do not satisfy the jurisdictional minimum, it is also threatening to eliminate the complete diversity requirement that has been a pillar of diversity jurisdiction since 1806. The Seventh Circuit predicted this result in *Stromberg*, even as it followed the Fifth Circuit:

> The complete-diversity rule of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), excludes from federal court cases in which citizens of the same state are on each side. Supplemental jurisdiction has the potential to move from complete to minimal diversity.

Stromberg, 77 F.3d at 932; *see also Channel v. Citicorp Nat'l Serv., Inc.*, 89 F.3d 379, 385 (7th Cir. 1996) (citing *Stromberg* and stating that Seventh Circuit case law implies "that *Strawbridge* has been curtailed for cases within the scope of § 1367") (Easterbrook, J.).

In short, under the Fifth and Seventh Circuit's interpretation of Section 1367, the statute substantially

encroaches upon the States' role in interpreting state law and significantly taxes federal court resources. Such a result, especially in light of the contrary rulings of the Third and Tenth Circuits, should not continue without this Court's imprimatur.

III.

THE COURT OF APPEALS' DECISION EXPANDING FEDERAL JURISDICTION IN DIVERSITY CASES WAS WRONG.

The Court of Appeals' determination that Section 1367 overruled *Zahn* was wrong. In addition to the Tenth and Third Circuits, numerous courts have addressed the Fifth Circuit's error. Judge Louis Pollak, in a thorough opinion that has been widely cited, aptly described the error:

> To retain this case in this court is to say to Congress: "We know what you meant to say, but you didn't quite say it. So the message from us in the judicial branch to you in the legislative branch is: Gotcha! And better luck next time." Such a message is not required by the separation of powers. Nor is it in harmony with the fact that Congress and the courts, however different their respective roles, are parts of a single government.

Russ v. State Farm Mut. Auto. Ins. Co., 961 F. Supp. 808, 820 (E.D. Pa. 1997), *quoted in Meritcare*, 166 F.3d at 221; and *Leonhardt*, 160 F.3d at 641 n.9.

In *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709 (C.D. Cal. 1995), the court pointed out that:

> the plain language of subsection (a) is entirely consistent with *Zahn*. Through incorporation of the language "*or as expressly provided otherwise by federal statute*", Congress specifically included as an exception to § 1367(a) any other federal statute, including § 1332 (and its most relevant judicial interpretations *Zahn* and *Snyder*). Despite references to diversity jurisdiction and § 1332, and with full knowledge of the Supreme Court's long-standing interpretations of that language, nowhere in the Act did Congress change the language of § 1332. In choosing once again to keep the language of § 1332 in its original form, Congress reaffirmed the Supreme Court's historical treatment of the language "matter in controversy."

Id. at 716; *see also Crosby v. America Online, Inc.*, 967 F. Supp. 257, 263 n.4 (N.D. Ohio 1997) (same).

Moreover, the divergent interpretations of the statutory text lend credence to the argument that Section 1367 is ambiguous and therefore that reference to legislative history is appropriate. The only piece of legislative history is a House Judicial Committee report that specifically cites *Zahn* as a case unaffected by Section 1367. The House report was reproduced "substantially verbatim" in an analysis provided to the Senate. *See Russ*, 961 F. Supp. at 815, 818. The legislative history "is conclusive," *id.* at 820, that the *Zahn* principle was to be preserved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JUNE 3, 1999

Robin FREE and Renee Free,
Plaintiffs-Appellants,

v.

ABBOTT LABORATORIES, INC., Bristol-Myers Squibb Company, Inc., and Mead Johnson & Company, Defendants-Appellees.

No. 97-31341.

United States Court of Appeals,
Fifth Circuit.

June 3, 1999

* * *

Before REYNALDO G. GARZA, JONES and DeMOSS, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The appellants, consumers of infant formula, sued the above-named manufacturers of infant formula under Louisiana's antitrust laws alleging a price-fixing conspiracy. Because this case is before us for a third time, it is unnecessary to recapitulate the procedural and factual history. *See Free v. Abbott Lab., Inc.,* 164 F.3d 270 (5th Cir.1999); *Free v. Abbott Lab.,* 51 F.3d 524 (5th Cir.), *reh'g denied,* 65 F.3d 33 (1995).

Appendix A

This panel certified two state law questions to the Louisiana Supreme Court: 1) whether Louisiana antitrust law grants standing to indirect purchasers[1] of consumer products; and, 2) whether Louisiana antitrust law provides a cause of action for interstate conspiracies in restraint of trade, or whether such suits are limited to wholly intrastate conspiracies. *See Abbott Lab.*, 164 F.3d at 277. The Louisiana Supreme Court denied certification, leaving us to fathom Louisiana's unsettled antitrust law as Louisiana courts would do it. *See Federal Deposit Ins. Corp. v. Abraham,* 137 F.3d 264, 268 (5th Cir.1998). In our best judgment, the Louisiana courts would follow the federal indirect purchaser rule and deny standing to the appellants. *See Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S. Ct. 2061, 52 L.Ed.2d 707 (1977). In reaching this conclusion, we assume *arguendo* that Louisiana antitrust laws apply to a conspiracy carried on interstate that has effects within the state. *But see HMC Management Corp. v. New Orleans Basketball Club,* 375 So.2d 700, 706-07 (La.Ct.App.1979).

DISCUSSION

Louisiana law permits any person "who is injured in his business or property by any person by reason of any act or thing forbidden by this Part, [to] sue . . . and . . . recover threefold the damages sustained by him, the cost of suit, and a reasonable attorney's fee." La. Rev. St. Ann. § 51:137

1. Indirect purchasers "are not the immediate buyers from the alleged antitrust violators," but are those who buy goods through an intermediary such as a retailer or wholesaler. *Kansas v. UtiliCorp United, Inc.,* 497 U.S. 199, 207, 110 S.Ct. 2807, 2812, 111 L.Ed.2d 169 (1990).

Appendix A

(West 1987). This section is virtually identical to the federal antitrust enforcement provision, § 4 of the Clayton Act.[2] Although the Clayton Act is silent with respect to the standing afforded indirect purchasers, the United States Supreme Court long ago interpreted it to deny standing to indirect purchasers. *See Illinois Brick,* 431 U.S. at 745-48, 97 S.Ct. at 2074-75.

No Louisiana case directly addresses the issue of standing. The Louisiana Supreme Court afforded relevant insight to interpreting state antitrust statutes that are "virtually identical" to their federal counterpart when it noted that "the United States Supreme Court's interpretation . . . should be a persuasive influence on the interpretation of our own state enactment." *Louisiana Power and Light Co. v. United Gas Pipe Line Co.,* 493 So.2d 1149, 1158 (La.1986). Lower Louisiana courts have likewise considered federal antitrust standards a starting point for interpreting counterpart state statutes. *See, e.g., Louisiana ex rel. Ieyoub v. Bordens, Inc.,* 684 So.2d 1024, 1027 (La.Ct.App.1996), *writ denied,* 690 So.2d 42 (La.1997); *Reppond v. City of Denham Springs,* 572 So.2d 224, 228 (La.Ct.App.1990). The courts are not, however, required to abide by the federal standard if

2. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1997), states in part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

compelling justifications exist for not doing so. *See Louisiana Power,* 493 So.2d at 1158 (cautioning that "federal analysis is not controlling"); *Reppond,* 572 So.2d at 228 n. 2 (same).

In *Louisiana Power,* the Louisiana Supreme Court held that a parent company and its subsidiary are capable of conspiring in restraint of trade under the Louisiana antitrust law — contrary to the United States Supreme Court's interpretation and in spite of virtually identical state and federal statutes. *See* 493 So.2d at 1158-60; *cf. Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). The court articulated a number of reasons for deviating from the *Copperweld* decision. First, as a 1931 state court decision had held intraenterprise conspiracies violative of Louisiana antitrust law, the state's precedent was firmly established. Second, before the United States Supreme Court modified its interpretation of the Sherman Antitrust Act in *Copperweld,* it, too, had proscribed intraenterprise conspiracies under the federal law.[3] Moreover, *Copperweld* does not expressly exclude federal antitrust liability where the conspirator is partially-owned, as in *Louisiana Power,* rather than a wholly-owned subsidiary. Third, a per se rule exempting parent/subsidiary conspiracies from Louisiana antitrust law would divest the courts of authority reposed in them by the legislature — a result particularly worrisome because intraenterprise activity can have the same adverse economic effects as traditional conspiracies in restraint of trade. Fourth, the Louisiana

3. *See United States v. Yellow Cab Co.,* 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947).

antitrust laws aspire to a political as well as strictly economic purpose: their political goal is to "provid[e] an environment conducive to the preservation of our democratic political and social institutions."[4] Fifth, the Louisiana court was commanded by the "unqualified" statutory prohibition of "every" contract, combination or conspiracy in restraint of trade in Louisiana. La.Rev.Stat. Ann. § 51:122; *Louisiana Power,* 493 So.2d at 1160.

A careful comparison demonstrates that *Louisiana Power* is distinguishable from this case. Consider first the superficially formidable issue of the "plain meaning" of the remedy statute. Although the language of § 137, the statute here at issue, is also broad, whether it is "unqualified" like § 122 is the issue before us. No Louisiana court has squarely so held,[5] and the Supreme Court decision in *Illinois Brick* rested not on the breadth of "any person," but on the extent of injury to "business or property" comprehended by the antitrust laws. *See* 431 U.S. at 729, 97 S.Ct. at 2066. Antitrust injury has always been a policy laden-concept designed, inter alia, to distinguish damages caused by anticompetitive conduct from those not so caused. *See, e.g., Spectrum Sports,*

4. *Louisiana Power,* 493 So.2d at 1152 (quoting *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958)).

5. In *State ex rel. Ieyoub v. Borden, Inc.,* 1995 WL 59548 (E.D.La. Feb.10, 1995), the federal district court noted, while discussing an issue of diversity jurisdiction, the absence of Louisiana caselaw interpreting whether § 137 provides a remedy for indirect purchasers. The decision contains no holding on the issue before us.

Inc. v. McQuillan, 506 U.S. 447, 458-59, 113 S.Ct. 884, 891-92, 122 L.Ed.2d 247 (1993). Louisiana courts have not eschewed the importance of defining antitrust injury in this manner but, in fact, have deferred to federal precedent. *See, e.g., J.B.N. Morris v. Rental Tools, Inc.,* 435 So.2d 528, 534 n. 1 (La.Ct.App.1983). The nature of antitrust injury encompassed by § 137 thus best characterizes the question before us.

Viewed from this perspective, the purposes of § 137 and § 122 differ significantly and further distinguish *Louisiana Power.* Section 122 was interpreted as "unqualified" in order to proscribe conduct promoted by one enterprise that may be economically as harmful as classic conspiratorial conduct between unrelated entities. Section § 137, however, runs the risk of functional deconstruction if interpreted to provide an "unqualified" right of recovery. In addition, the courts' role in policing conduct violative of Louisiana antitrust policy would not be diminished by a rule restricting recovery to direct purchasers; on the contrary, the remedy would become more effective. The *Louisiana Power* decision, on the other hand, concluded that a narrower construction of § 122 would divest courts of authority under the antitrust laws. *See* 493 So.2d at 1159. Finally, the political goal of the antitrust laws and the goal of furthering the economically efficient allocation of resources are both well served by rationalizing the antitrust remedy as the Supreme Court did in *Illinois Brick.*

The *Illinois Brick* rule permitting only direct purchasers to sue for antitrust injury reduces the "dimensions of complexity" that would otherwise curtail the effectiveness

of antitrust suits, *see* 431 U.S. at 737, 97 S.Ct. at 2070, and encourages "vigorous private enforcement" by enhancing direct purchasers' incentive to bring antitrust suits. *See id.* at 745-46, 97 S.Ct. at 2074-75. In contrast, the rule advocated by the Frees for antitrust recovery suits resembles chaos theory (a butterfly flapping its wings in the Amazon will affect global climate). *See* James Gleick, *Chaos: Making a New Science* (1987). The focus of suits would shift from the amount of increased prices caused by defendants' anticompetitive conduct (a relatively straightforward inquiry) to the allocation of damages among parties in the line of distribution to ultimate consumers. Litigation would be prolonged, would become far more complex factually and strategically, and would benefit lawyers and determined defendants while reducing recoveries for plaintiffs.[6]

The Frees seem to object that adopting the *Illinois Brick* rule deprives them of a state law recovery that would supplement, not conflict with federal law. *See California v. ARC America Corp.,* 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989). But this assertion misses the mark. Neither the *California* case nor any cited Louisiana policy advocates increasing penalties on antitrust defendants or maximizing Louisiana plaintiffs' recovery as compared with federal law remedies. Instead, the question is whether

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6. As appellees correctly describe the non-*Illinois Brick* position: "To recover damages, every member of the [Frees'] putative class would have to prove not only the magnitude of the alleged overcharge in wholesale prices at the time they bought infant formula, but the retail prices paid and the proportion of the alleged wholesale overcharge passed on to consumers through those retail prices." Appellees' brief at 32.

Appendix A

Louisiana seeks to enforce a coherent state antitrust law that places the incentive to sue on the party best situated to recover. Because the *Illinois Brick* scheme is preferable for this purpose, we believe Louisiana courts would follow it.

Bolstering this conclusion is the fact that the majority of state appellate courts faced with this same issue have decided to follow the *Illinois Brick* road.[7] For these reasons, the appellants, as indirect purchasers of infant formula, lack standing to bring the present state antitrust claim.

Accordingly, we AFFIRM the district court's dismissal of appellants' claims.

AFFIRMED.

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7. *See Blewett v. Abbott Lab., Inc.*, 86 Wash.App. 782, 938 P.2d 842, 845-46 (1997); *Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100, 108, (Fla.Dist.Ct.App.1996); *Stifflear v. Bristol-Myers Squibb Co.*, 931 P.2d 471, 475-76 (Colo.Ct.App.1996). *But see Hyde v. Abbott Lab., Inc.*, 123 N.C.App. 572, 473 S.E.2d 680, 685-86 (1996) Several states have statutorily overruled *Illinois Brick*'s indirect purchaser rule, allowing any person to sue for antitrust violations whether injured "directly or indirectly." *See, e.g.*, Minn.Stat. § 325D.57 (1994) (recognized in *Minnesota ex rel. Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490 (Minn.1996)); Cal. Bus. & Prof.Code § 16750(a) (West 1997) (recognized in *Cellular Plus, Inc. v. Superior Court*, 14 Cal.App.4th 1224, 18 Cal.Rptr.2d 308 (1993)). Other states have taken the opposite approach and statutorily denied standing to indirect purchasers. *See, e.g.*, 740 Ill. Comp. Stat. Ann. 1°/₇(2) (West 1994) (recognized in *Gaebler v. New Mexico Potash Corp.*, 285 Ill.App.3d 542, 221 Ill.Dec. 707, 676 N.E.2d 228, 230 (1997) (permitting only the state attorney general to bring indirect purchaser suits)).

APPENDIX B — ORDER OF THE SUPREME COURT OF LOUISIANA DATED MARCH 19, 1999

Robin FREE and Renee FREE
v.
ABBOTT LABORATORIES, INC., Bristol-Meyers Squibb Company, Inc. and Mead Johnson & Company.

No. 99-CQ-0189

Supreme Court of Louisiana.

March 19, 1999

IN RE: Fee, Robin; — Plaintiff(s); Applying for Certified Question; United States 5th Cir.Ct. Number 97-31341;

Certification denied.

CALOGERO, C.J. and LEMMON and JOHNSON, JJ. would grant the certification.

KIMBALL, J. not on panel; recused.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JANUARY 19, 1999

Robin FREE and Renee Free,
Plaintiffs-Appellants,

v.

ABBOTT LABORATORIES, INC., Bristol-Myers Squibb Company, Inc., and Mead Johnson & Company, Defendants-Appellees.

No. 97-31341.

United States Court of Appeals,
Fifth Circuit.

Jan. 19, 1999.

* * *

Before REYNALDO G. GARZA, JONES and DeMOSS, Circuit Judges.

EDITH H. JONES, Circuit Judge:

In this second appeal generated by an antitrust class action against baby-formula manufacturers, appellants renew their argument that the district court's exercise of diversity jurisdiction was improper because their claims did not satisfy the amount in controversy requirement of 28 U.S.C. § 1332 (1993). They alternatively contend that the district court erred in ruling that Louisiana antitrust law denied them standing

due to their status as indirect purchasers. Since the precise issue of jurisdiction was decided by this court before, the law of the case prevents its being reconsidered. In addition, we have determined that the indirect purchaser question and the interstate/intrastate conspiracy question must be certified to the Louisiana Supreme Court because they represent important state antitrust law policy decisions for which no controlling precedent exists. Notwithstanding the certification, we affirm the district court's dismissal of the Frees' other claims.

PROCEDURAL HISTORY

Appellants filed their class action petition against appellees Abbott Laboratories, Bristol-Myers Squibb Company, and Mead Johnson & Company (collectively "Abbott Labs") in Louisiana state court alleging a price-fixing conspiracy. Appellees removed the case to federal district court. The Frees objected to the removal, arguing that the federal court lacked jurisdiction because they sought only $20,000 in damages and thus did not satisfy the $50,000 amount in controversy requirement then prescribed by 28 U.S.C. § 1332. The district court ruled that since Louisiana law provided for attorneys' fees to be awarded to the named plaintiffs and not the attorneys, the amount recoverable by the plaintiffs exceeded the $50,000 threshold. However, the court applied the *Colorado River* abstention doctrine and tried to remand the case back to state court.

On appeal, this court agreed with the district court's conclusion that diversity jurisdiction existed. *See In re Abbott Lab.*, 51 F.3d 524, 526, *on reh'g*, 65 F.3d 33 (5th Cir.1995).

The court relied upon Article 595 of the Louisiana Code of Civil Procedure, which, together with § 51:137 of the Louisiana Revised Statutes, expressly awards attorneys' fees to the "representatives" of a class and the injured parties. *Id.* But the panel also held that the district court improperly abstained and accordingly vacated the remand to state court. *Id.* at 529-30.

Back in the federal district court, the Frees were unable to persuade the court that Louisiana antitrust law, unlike its federal counterpart, granted standing to indirect purchasers. The district court dismissed both the state law antitrust claims and the other state claims asserted by appellants.

DISCUSSION

A. Jurisdiction

Undeterred by this court's previous decision, appellants again contend that the federal courts' exercise of diversity jurisdiction was improper because their claims did not satisfy the amount in controversy requirement of 28 U.S.C. § 1332. The prior panel allegedly erred, according to the Frees, by crediting to them the class attorneys' fees for purposes of calculating the amount in controversy and by applying Louisiana's "procedural" attorneys' fee law (Art. 595) in a federal diversity case. Although appellants' argument bears on federal courts' jurisdiction, this is not an issue that we will reconsider.

Once a panel of this court has decided an issue of law or fact, the decision continues to govern all subsequent stages

of the same case. *See United States v. Becerra,* 155 F.3d 740, 752 (5th Cir.1998); *Copeland v. Merrill Lynch & Co. Inc.,* 47 F.3d 1415, 1423 (5th Cir.1995). Known as the law of the case doctrine, this principle is necessary to bring finality to litigation and to discourage "panel shopping" by litigants. *See Becerra,* 155 F.3d at 752. While application of the doctrine is discretionary, this court will generally refuse to revisit a prior panel's decision unless "(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work [sic] manifest injustice." *Id.* at 752-53. (quoting *North Miss. Comms., Inc. v. Jones,* 951 F.2d 652, 656 (5th Cir.1992)).

The Frees dispute application of the law of the case doctrine on two grounds. First, based on a recent *en banc* decision of this court, they urge that federal courts must constantly examine each case for subject matter jurisdiction, and if it does not exist, must remand the case to state court. *See Marathon Oil Co. v. Ruhrgas,* 145 F.3d 211 (1998), *cert. granted,* __ U.S. __, 119 S.Ct. 589, __ L.Ed.2d __, 67 U.S.L.W. 3273 (1998). The *Marathon* rule does not apply. Certainly, a federal court must always be satisfied that subject matter jurisdiction exists and must even raise the issue *sua sponte, Steel Co. v. Citizens For A Better Env't,* 523 U.S. 83, 118 S.Ct. 1003, 1012, 140 L.Ed.2d 210 (1998), but *Marathon* dealt with whether courts must initially determine subject matter jurisdiction before reaching the issue of personal jurisdiction. The Frees advocate a quite different rule of perpetual re-examination of precisely the same issue of subject matter jurisdiction. Other circuits have, however,

refused to recognize a "jurisdiction exception" to the law of the case doctrine. *See Ferreira v. Borja,* 93 F.3d 671, 674 (9th Cir.1996), *cert. denied,* __ U.S. __, 117 S.Ct. 972, 136 L.Ed.2d 856 (1997) ("Surely a court that has decided that it has jurisdiction is not duty-bound to entertain thereafter a series of repetitive motions to dismiss for lack of jurisdiction."); *LaShawn v. Barry,* 87 F.3d 1389, 1394 (D.C.Cir.1996), *cert. denied,* __ U.S. __, 117 S.Ct. 2431, 138 L.Ed.2d 193 ("[T]his court and other courts of appeals routinely apply law-of-the-case preclusion to questions of jurisdiction. . . ."). We see no reason to deviate from the weight of authority.[1]

The Frees' second argument emphasizes that in a lawsuit removed from state court, as this was, "[if] at any time before final judgment it appears that the District Court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). And, reinforcing this language, the Supreme Court has observed that, "[d]espite a federal trial court's threshold denial of a motion to remand, if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated." *Caterpillar, Inc. v. Lewis,* 519 U.S. 61, 117 S.Ct. 467, 477, 136 L.Ed.2d 437 (1996) (emphasis in

1. Although the Third Circuit disagreed with the Ninth and D.C. Circuits, its decision is not inconsistent with our present decision because it limits re-examination of prior decisions to "extraordinary circumstances [that] warrant such reconsideration." *Public Interest Research Group v. Magnesium Elektron, Inc.,* 123 F.3d 111, 118 (3d Cir.1997). The "extraordinary circumstances" approved of by the *Magnesium Elektron* Court are the same exceptions to the law of the case doctrine recognized by this court in *Becerra. See id.* at 116-18.

original) (citing Fed.R.Civ.P. 12(h)(3)). The Frees ignore, however, that our prior panel found that no jurisdictional defect burdens this case. That prior decision was based on a straightforward application of Louisiana law in a diversity context. Had the controlling law or facts changed, or had some glaring error in removal procedure been uncovered, *see e.g., Caterpillar, supra,* we would be obliged by the foregoing authorities to reassess jurisdiction. To this extent, an issue of jurisdiction imposes a more rigorous inquiry than the ordinary discretion attendant to the law of the case doctrine. But none of the warning signs is present here.

The only ground of re-examination urged by the Frees, other than their complaint that the prior panel got it wrong on jurisdiction, is the Louisiana appellate court's decision in *In re Gas Water Heater Prods. Liab. Litig.,* 697 So.2d 341 (La.Ct.App.1997), *rev'd,* 711 So.2d 264 (La.1998), which held that attorneys' fees awarded under Article 595 have no effect on the amount in controversy for state court jurisdiction purposes. Appellants fail to note that the *Gas Water Heater* court approved of and distinguished the prior decision in this case on the basis that it involved a suit under Louisiana's antitrust laws, which statutorily provide for attorneys' fees as an element of the plaintiffs' damages. *See id.* at 346 ("[B]ecause attorney's fees are included as a statutory element of a plaintiff's damages, consideration of attorneys' fees was proper to determine the jurisdictional amount for a jury trial."). *Gas Water Heater* reinforces rather than defeats the prior Fifth Circuit opinion in this case.

The issue of subject matter jurisdiction may not, for all of these reasons, be reconsidered in this appeal.

B. Other State Law Claims

Appellants argue that the district court erroneously dismissed their claims alleging violations of Louisiana's general tort statute, La. Civ.Code Ann. art. 2315 (West 1997), and fraud statute, La. Civ.Code Ann. art. 1953 (West 1997). The appellants' arguments are unpersuasive.

The Frees rely on *Loew's, Inc. v. Don George, Inc.*, 237 La. 132, 110 So.2d 553 (La.1959), to support their contention that antitrust plaintiffs in Louisiana may also sue in tort under article 2315. Contrary to appellants' argument, however, *Loew's* does not stand for the proposition that alleged antitrust violators are also liable in tort. *Loew's* held that the statute of limitations for Louisiana antitrust actions was the same as for tort actions because antitrust actions resemble tort actions more than breach of contract actions. *See id.* at 557-60. Because neither the Louisiana Supreme Court nor the Louisiana legislature has recognized a tort cause of action for violations of state antitrust laws, we likewise decline to recognize its existence.[2]

Appellants next contend that they have stated a valid cause of action for fraud under Article 1953. However, "[t]o recover under Article 1953, [the Frees] must demonstrate the existence of a contract." *Newport Ltd. v. Sears, Roebuck & Co.*, 6 F.3d 1058, 1067 (5th Cir.1993). Because the Frees

2. Appellant's argument is even more incongruous with Art. 2315, considering that the Civil Code provision is expressly addressed to negligent conduct. Antitrust price-fixing is hardly negligent.

were indirect purchasers of infant formula and had no contract with appellees, they have not stated a valid cause of action. Although the Frees correctly note that an action for fraud (negligent misrepresentation) can also be based in tort under article 2315, *see id.* at 1068, the Frees' claim likewise fails because they are required to show that Abbott Labs owed them a legal duty to disclose information. *See Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1131 n. 33 (5th Cir.1988), *vacated on other grounds sub nom., Fryar v. Abell*, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989); *Wise v. Lapworth*, 614 So.2d 728, 731-32 (La.Ct.App.1993). Since Abbott Labs owed no legal duty to disclose their alleged price-fixing scheme, the Frees have failed to allege a valid cause of action.

C. Motion to Certify Louisiana Antitrust Questions

The appellants have moved this court to certify the remaining two issues to the Louisiana Supreme Court. Specifically, they request certification concerning whether Louisiana antitrust law affords a cause of action to indirect purchasers of infant formula and whether Louisiana law prohibiting conspiracies "in restraint of trade or commerce in this state" applies to alleged interstate conspiracies.

"As a general proposition we are chary about certifying questions of law absent a compelling reason to do so; the availability of certification is such an important resource to this court that we will not risk its continued availability by going to that well too often." *Jefferson v. Lead Indus. Assoc. Inc.*, 106 F.3d 1245, 1247 (5th Cir.1997) (per curiam).

Requests to certify questions to the highest court of a state are generally denied when the primary reason for certification is that state courts have not issued a definitive answer on the particular issue. *See Transcontinental Gas Pipeline Corp. v. Transportation Ins. Co.*, 958 F.2d 622, 623 (5th Cir.1992). "Certification is not a panacea for resolution of those complex or difficult state law questions which have not been answered by the highest court of the state." *Id.* Nevertheless, certification may be advisable where important state interests are at stake and the state courts have not provided clear guidance on how to proceed. *Id.* The tests for certification are easily satisfied here.[3]

1. Indirect Purchaser Rule

Appellants argue that the district court erred in concluding that Louisiana antitrust law denies standing to consumers of infant formula who are indirect purchasers from the defendant manufacturers. Louisiana antitrust law permits "any person who is injured" by an antitrust violation to sue

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3. Since 1990, this court has certified only nine cases to the Louisiana Supreme Court. *See Hodgen v. Forest Oil Corp.*, 87 F.3d 1512 (1996); *Wallace v. Shreve Mem. Library*, 79 F.3d 427 (1996); *Naquin v. Prudential Assurance Co., Ltd.*, 65 F.3d 427 (1995); *First Nat'l Bank of Boston v. Beckwith Mach. Co.*, 26 F.3d 580 (1994); *Schirmer v. Edwards*, 2 F.3d 117 (1993); *Grubbs v. Gulf Int'l Marine Inc.*, 985 F.2d 762 (1993); *Frey v. Amoco Prod. Co.*, 951 F.2d 67 (1992); *Louisiana v. Roemer*, 949 F.2d 145 (1991). In the most recent instance, we certified the pressing question "whether dairy cows owned by a dairy farmer are exempt as tools or instruments of the debtor's trade under Louisiana Revised Statute 13:3881(A)(2)." *Wilson v. Bryan*, 162 F.3d 378, (5th Cir. 1998).

the offender for treble damages, costs, and attorneys' fees. *See* La. Rev. St. Ann. § 51:137 (West 1987).[4] Section 137 is nearly identical to the federal enforcement provision, § 4 of the Clayton Act,[5] which the United States Supreme Court has interpreted to deny standing to indirect purchasers. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46, 97 S.Ct. 2061, 2074-75, 52 L.Ed.2d 707 (1977). Because Louisiana courts have never decided whether Louisiana's antitrust law is comparably limited, the district court decided the issue as if it were a Louisiana appellate court. *See Federal Deposit Ins. Corp. v. Abraham*, 137 F.3d 264, 268 (5th Cir.1998). The court concluded that Louisiana would follow the federal indirect purchaser rule because the language of the two provisions is nearly identical and Louisiana courts often look

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4. Section 51:137 reads:

> Any person who is injured in his business or property by any person by reason of any act or thing forbidden by this Part may sue in any court of competent jurisdiction and shall recover threefold the damages sustained by him, the cost of suit, and a reasonable attorney's fee.

5. 15 U.S.C. § 15 (1997). Section 4 of the Clayton Act reads in part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

to federal antitrust jurisprudence for guidance in interpreting the state's antitrust laws.[6]

The Frees — and the Louisiana Attorney General as *amicus curiae* — urge that the Louisiana Supreme Court would decline to follow the federal indirect purchaser rule. The decisions of Louisiana courts have provided mixed signals on how to interpret state antitrust statutes when a corresponding federal rule exists. For example, in *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*, 493 So.2d 1149, 1158 (La.1986), the Louisiana Supreme Court noted that, given the similarity between the federal and state antitrust provisions, the federal interpretation "should be a persuasive influence on the [state's] interpretation." *Id.; see also Reppond v. Denham Springs*, 572 So.2d 224, 229-30 (La.Ct.App.1990) (finding that the "sound reasoning" of the federal antitrust rule justified its incorporation into state antitrust jurisprudence). In spite of this observation, however, the *Louisiana Power* court declined to follow the federal rule. *See* 493 So.2d at 1160. These cases provide little support

6. Several state courts have interpreted their own antitrust laws, which also mirror § 4 of the Clayton Act, to deny standing to indirect purchasers. *See Blewett v. Abbott Labs., Inc.*, 86 Wash.App. 782, 938 P.2d 842, 845-46 (Wash.Ct.App.1997); *Stifflear v. Bristol-Myers Squibb Co.*, 931 P.2d 471, 475-76 (Colo.Ct.App.1996); *Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100, 108, (Fla.Dist.Ct.App.1996). *But see Hyde v. Abbott Labs., Inc.*, 123 N.C.App. 572, 473 S.E.2d 680, 686 (1996) (refusing to adopt the *Illinois Brick* rule, even though the state's antitrust statute is patterned after § 4 of the Clayton Act); *Blake v. Abbott Labs., Inc.*, 1996 WL 134947 (Tenn.Ct.App. March 27, 1996) (granting standing to indirect purchasers under the Tennessee Trade Practices Act).

either for adoption of the federal antitrust rule, as in *Reppond*, or for rejection of the federal model, as in *Louisiana Power*. Given the importance of the indirect purchaser issue and the lack of clear guidance from the courts of Louisiana, we certify the question to the Louisiana Supreme Court.

2. Interstate/Intrastate Conspiracy

Louisiana antitrust law prohibits every "conspiracy, in restraint of trade or commerce in this state. . . ." La. Rev. Stat. Ann. § 51:122 (West 1987). The parties disagree on the meaning of the term "in this state." The Frees contend that it creates a cause of action for alleged interstate conspiracies that have the effect of restraining trade in Louisiana. Abbott Labs, on the other hand, argues that the statute covers only those conspiracies that are wholly intrastate. Because neither the language of the statute nor Louisiana caselaw resolves this important antitrust issue, we certify it to the Louisiana Supreme Court.

Each party supports its respective argument by referring to the plain language of the statute and to the canons of statutory construction. The Frees cite the "last antecedent" canon,[7] arguing that the qualifying phrase "in this state" applies to the immediately preceding phrase "trade or commerce." Therefore, the statute should be read to prohibit

7. Under the "last antecedent" canon of statutory construction, a qualifying phrase in a statute "usually is construed to apply to the provision or clause immediately preceding it." *In re RLV*, 484 So.2d 206, 209 (La.Ct.App.1986) (quoting Sutherland Stat. Const. § 47.33 (4th ed.1984)).

any price-fixing conspiracy that restrains trade in Louisiana. Abbott Labs counters with a canon of its own: "the act as a whole ought to be interpreted so that no clause, sentence, or word shall be superfluous, or meaningless, if that result can be avoided." *Dore v. Tugwell,* 228 La. 807, 84 So.2d 199, 204 n. 6 (La.1955) (internal quotations omitted) (*quoting Hibernia Nat'l Bank v. Louisiana Tax Comm'n.,* 195 La. 43, 196 So. 15, 18 (1940)). Abbott Labs argues that because the statutory definition of "commerce" specifies that "commerce means trade or commerce *within this state,*" La.Rev.Stat. Ann. § 51:121 (West 1987) (emphasis added), the phrase "in this state" found in § 122 would be superfluous if it referred to the trade or commerce involved as the Frees contend. Thus, Abbot Labs argues that to give meaning to the definition of "commerce," the term "in this state" must apply only to the conduct prohibited by the statute and not the commerce involved.

In spite of these statutory arguments, the language of § 122 does not resolve the interstate/intrastate conspiracy issue. Neither do the decisions of the Louisiana courts. Each party cites *HMC Management Corp. v. New Orleans Basketball Club,* 375 So.2d 700 (La.Ct.App.1979), to justify its respective argument. In *HMC,* the plaintiffs sued the Jazz, a professional basketball team, alleging that the Jazz breached its agreement to lease a New Orleans sports venue in violation of Louisiana's antitrust statutes. The Jazz countered that they were engaged in interstate commerce, and therefore, federal antitrust laws preempted Louisiana's antitrust laws. The court agreed with the Jazz and, with respect to those claims that involved interstate commerce,

held that Louisiana's antitrust law did not apply. *Id.* at 706-07. The lease agreement, however, might be within the reach of Louisiana's antitrust laws because it was an "area of state interest," and the determination whether the Jazz violated the lease was a "state question." *Id.* at 707; *see also English v. National Collegiate Athletic Ass'n,* 439 So.2d 1218, 1223-24 (La.Ct.App.1983) (holding that because the NCAA football program engages in interstate commerce, § 122 does not apply). Abbott Labs cites *HMC* and *English* for the proposition that Louisiana antitrust law applies only to intrastate conduct.[8] Not surprisingly, the Frees disagree and argue that these cases do not apply to this case because they apply only to interstate sporting associations.

Finally, appellants refer to Judge Posner's reasoning in *In re Brand Name Prescription Drugs Antitrust Litig.,* 123 F.3d 599, 612-613 (7th Cir.1997), where he concluded that Alabama's antitrust statue covered interstate conduct because to hold otherwise would render the statute a "dead letter" and because the modern trend among state courts is to interpret antitrust statutes to cover interstate commerce. *Id.* The Frees thus argue that limiting § 122 to cover only intrastate commerce would likewise kill the antitrust statute because virtually no commercial activity is purely intrastate. Notwithstanding the force of this logic, however, we conclude that the Louisiana Supreme Court is better suited

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8. The appellees also rely on *Al Copeland Enters. v. Jamplis,* 1991 WL 49651 *5 (E.D.La.1991), to argue that "Louisiana antitrust laws do not apply to interstate commerce. . . ." Although the federal district court made this legal finding, it does not guide us in resolving how the Louisiana Supreme Court would decide the issue.

to decide this important state antitrust issue and therefore certify the question to the Louisiana Supreme Court.[9]

CERTIFICATION

Because these antitrust issues are matters of Louisiana law that will determine the outcome of this case and because there are no clear controlling precedents in the decisions of the Louisiana Supreme Court, we hereby invoke the certification privilege granted by Louisiana Supreme Court Rule XII.[10]

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9. Our conclusion that the Louisiana Supreme Court should resolve this issue is reinforced by the subsequent events surrounding the *Prescription Drugs* case. One year after the Seventh Circuit's decision, the Alabama Supreme Court rejected *Prescription Drugs* and held that its antitrust laws are limited to intrastate conduct. *See Abbott Labs. v. Durrett,* 1998 WL 436062, at *22 (Ala. July 31, 1998).

10. Louisiana Supreme Court Rule XII, section 1 reads:

> When it appears to the Supreme Court of the United States, or to any circuit court of appeal of the United States, that there are involved in any proceedings before it questions or propositions of law of this state which are determinative of said cause independently of any other questions involved in said case and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court before rendering a decision may certify such questions or propositions of law of this state to the Supreme Court of Louisiana for rendition of a judgment or opinion concerning such questions or propositions of Louisiana law. This court may, in its discretion, decline to answer the questions certified to it.

We certify the following questions to the Louisiana Supreme Court:

1) Does the Louisiana antitrust enforcement provision, La. Rev. St. Ann. § 51:137 (West 1987), allow the federal rule as outlined in *Illinois Brick v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), and deny standing to indirect purchasers of products whose prices have been illegally fixed in an alleged conspiracy violative of the statute?

2) Does La. Rev. St. Ann. § 51:122 (West 1987), apply to an alleged interstate conspiracy to fix the wholesale price of infant formula that has the effect of restraining trade in Louisiana?

If the Louisiana Supreme Court accepts this certificate, the answers provided will determine the outcome of this appeal. We disclaim any intent that the Louisiana Supreme Court confine its reply to the precise form or scope of the legal questions certified. We retain cognizance of this case while pending before the Louisiana Supreme Court and transfer the record and appellate briefs with our certification to the Supreme Court of Louisiana.

Appellants' motion to certify the indirect purchaser question and the interstate conspiracy question to the Louisiana Supreme Court is GRANTED.

APPENDIX D — RULING OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA ON MOTIONS TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT DATED NOVEMBER 6, 1997

Robin FREE and Renee Free

v.

ABBOTT LABORATORIES, Bristol-Myers Squibb Company, Mead Johnson & Company.

No. CIV. A. 93-971-A.

United States District Court,
M.D. Louisiana.

Nov. 6, 1997.

* * *

RULING ON MOTIONS TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

JOHN V. PARKER, Chief Judge.

This matter is before the court on motions to dismiss, or in the alternative, for summary judgment by defendants, Bristol-Myers-Myers Squibb Company and Mead Johnson & Company. Also pending is a motion to dismiss by defendants, Abbott Laboratories. Because Abbott

Laboratories adopts the memoranda filed on behalf of Bristol-Myers and Mead Johnson, the court will address the motions by referring to defendants collectively. Removal jurisdiction is based upon 28 U.S.C. § 1332. In a prior ruling this court held that there is diversity of citizenship jurisdiction in this case which ruling was affirmed, although the court's attempt to remand the action to state court on the grounds of comity was reversed. See *In re Abbott Laboratories,* 51 F.3d 524 (5th Cir.1995).

Background

On October 14, 1993, plaintiffs filed this action seeking damages for economic loss including treble damages, attorney fees, and legal interest, The plaintiffs allege that defendants entered a conspiracy to fix prices in violation of Louisiana's antitrust law, La. R.S. 51:122 et seq. Specifically, plaintiffs allege "an understanding and concert of action among defendants, the substantial terms of which were to raise, fix, maintain and stabilize at artificially high levels the wholesale price of infant formula sold in the United States, including the state of Louisiana." Plaintiffs purportedly filed this lawsuit on behalf of themselves and a class of consumers who purchased one or more of defendants' brands of infant formula in the state of Louisiana at any time during the period of January 1, 1980 through December 31, 1992.

On February 23, 1996, defendants Bristol-Myers and Mead Johnson moved to dismiss plaintiffs' claims or alternatively for summary judgment. Subsequent to the filing of the motion by defendants, plaintiffs entered into settlement

agreements with defendants. The court tentatively certified a class for settlement purposes only. On December 16, 1996, on a motion by plaintiffs, this court held a fairness hearing concerning final approval of the settlement agreements. After careful consideration of the matter, the court, on January 21, 1997, denied the motion by plaintiffs for final approval of settlements. 953 F.Supp. 751.

Subsequently, the court denied defendants' motion for reconsideration regarding final approval of the settlements and ordered all parties to submit additional evidence and briefs on the pending motions to dismiss, or in the alternative for summary judgment.

Defendants move to dismiss plaintiffs' claim under Louisiana Antitrust Law, La. R.S. 51:122 et seq. on the basis that 1) indirect purchasers lack standing under La. R.S. 51:122 et seq. and 2) La. R.S. 51:122 only applies to intrastate, and not interstate, conspiratorial conduct. Defendants also move to dismiss plaintiffs' claims for failure to state a claim under La. Civil Code articles 2315[1] and 1953.[2] Each will be addressed respectively.

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1. La. Civil Code article 2315 reads:

> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

2. La. Civil Code article 1953 provides:

> Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust

(Cont'd)

Discussion

The court may not grant defendants' motion to dismiss for failure to state a claim unless it is clear that the plaintiffs can prove no set of facts consistent with the allegations of the complaint which would entitle them to relief. *Hishon v. King & Spalding,* 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). It is well established that the court must accept the factual averments as true, and view them in the light most favorable to the plaintiff. *Rankin v. City of Wichita Falls,* Tex., 762 F.2d 444 (5th Cir.1985).

Dismissal Under Louisiana Antitrust Law

To determine whether the complaint reveals facts which would foreclose recovery as a matter of law, the court must apply Louisiana substantive law. *Erie R.R. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) (holding that a federal court sitting in a diversity case in which there exists no applicable substantive federal statutory or constitutional law must apply relevant state substantive laws). In applying the substantive law of Louisiana, we recognize that civilian jurisdictions, such as Louisiana, follow the theory of jurisprudence constante.[3] Federal law (which obviously binds

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(Cont'd)

> advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.

3. In an article, "Life on a Federal Island in the Civilian Sea," 15 Mississippi College Law Review 1 (1994), Professor William E. Crawford explains the civilian theory:

(Cont'd)

this federal court) mandates that a federal court sitting in diversity determine state law by looking to the case law of the highest state court. *Texas Dept. of Housing and Community Affairs v. Verex Assurance, Inc.*, 68 F.3d 922, 928 (5th Cir.1995), citing *Ladue v. Chevron U.S.A., Inc.*, 920 F.2d 272, 274 (5th Cir.1991). Because the Louisiana Supreme Court has not decided the issue of whether indirect purchasers such as plaintiffs[4] have a cause of action under

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(Cont'd)

> The essence of the theory of jurisprudence constante, . . . is that judicial precedent is established by a judge on the basis of general rules of law provided by legislators for the decision of those disputes, and is not based on the general rules of law extracted from judicial precedent. The accumulated precedents gain significance because the words of the legislation, as consistently spoken by judges in their decisions, are attributed to the legislator, and the meaning of the rule of law enacted by the legislator is taken from the specific meaning given to it by judges. Further, the judge analyzes those judicial decisions to determine whether or not they comprise a general rule of law consistent with the needs of the pending case. If what he finds does not fit the needs of the case, then he may disregard the law as spoken by the judges and "return to the words of the general rule of law spoken by the legislator, under the theory that judges are bound to apply the law as given to them by the legislature and not as paraphrased by other judges." *Id.* at 4. (Footnotes omitted).

4. Plaintiffs do not claim that they are the immediate buyers from the defendants, the alleged antitrust violators. Rather, plaintiffs claim that the purported nationwide conspiracy caused retail prices of infant formula purchased by plaintiffs to be raised, fixed, maintained, and stabilized at artificially high prices. Plaintiffs are, therefore, only indirect purchasers.

the Louisiana antitrust law, this court must apply the law as the civilian system commands so as to determine what the state supreme court would hold if construction of the law were presented to it.

Interestingly, the substantive state law which federal law requires this court to apply, points the court back to federal case law for guidance. The applicable sections of Louisiana anti-trust law are essentially copies of federal anti-trust law. Because of this similarity, Louisiana courts routinely look to federal anti-trust jurisprudence as "a persuasive influence on interpretation of our own state enactments." See e.g. *La. Power & Light v. United Gas Pipe Line*, 493 So.2d 1149, 1158 (La.1986).

Louisiana law condemns price fixing. La. R.S. 51:122 provides:

> every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the state of Louisiana is illegal.[5]

The bone of contention in this litigation relates to the question of damages and who is allowed to claim them. The operative language is identical in both state and federal statutes. La. R.S. 51:137 provides:

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5. The federal counterpart, Section 1 of the Sherman Act, 15 U.S.C. § 1, reads: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

> "any person who is injured in his business or property by any person by reason of any act or thing forbidden by this Part may sue in any court of competent jurisdiction and shall recover three fold the damages sustained by him, the cost of suit, and a reasonable attorney's fee."[6]

Federal interpretation of the damages statute is quite clear: Under § 4 of the Clayton Act, indirect purchasers (consumers) need not apply for damages. The entire antitrust injury is inflicted upon direct purchasers only and the "passing on" of illegal price increases is not allowed either as a defense in an antitrust action or as damages to plaintiffs who are remote customers.

Plaintiffs here argue that they "persons" who have been injured in their business and property by a conspiracy to fix prices in which the defendants engaged and that under the clear wording of § 137 they are entitled to recover threefold the damages sustained by them. In effect, plaintiffs argue that the courts should apply Article 9 of the Louisiana Civil Code[7] and end the matter. Defendants argue that an in depth

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6. Section 4 of the Clayton Act 15 U.S.C. § 15 reads: "any person who shall be injured in his property or business by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained and the cost of suit, including a reasonable attorney's fee."

7. Article 9 of the Code reads: "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."

consideration of the issues will demonstrate that application of the literal words of the statute leads to absurd consequences and that further interpretation is required.

Initially it cannot be disputed that the purposes of both state and federal law are precisely the same — to discourage price fixing and other forms of restraint of trade and to punish those who engage in such conduct as well as to reward with treble damages the victims of such practices. It is also clear that treble damages are included as a statutory encouragement to private enforcement actions, dubbed "private attorneys general" by the Supreme Court. See e.g. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). The federal courts have concluded that antitrust enforcement actions are more likely to be initiated and prosecuted by those who have sustained the most damage rather than by indirect purchasers such as plaintiffs whose individual damage, even trebled, is quite small compared to the damages sustained by direct purchasers.

The court observes that such a proposition is clearly applicable to a case such as this which involves price fixing at the manufacturing level of infant formula distributed over a wide distribution chain and ultimately purchased by plaintiffs at retail outlets. The court also notes that the direct purchasers have already instituted actions against these defendants under federal law and that settlements have been reached with all direct purchasers who do business in the state of Louisiana. Such actions were concluded prior to initiation of this action.

The Supreme Court first directly considered the issue in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392

U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). There, the Court had before it an antitrust action brought by a shoe manufacturer against a manufacturer of shoe making equipment. The Court declined to allow the defendant manufacturer to plead that the plaintiff suffered no injury, assuming that defendant did illegally raise prices, because plaintiff was able to pass on the claimed illegal overcharges to those who bought shoes from it. The Court held that under § 4 of the Clayton Act "when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4." 392 U.S. at 489, 88 S.Ct. at 2229.

The Court also discussed a number of concerns and rejected the notion that "sound laws of economics" require recognition of such a defense:

> We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example) he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model,

> is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued . . . Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories. 392 U.S. at 492, 88 S.Ct. at 2231.

The court judicially notices that infant formula, like shoes, is sold to consumers by a wide range of retailers who vigorously compete with each other on a daily basis, and many of them are national chain stores with substantial resources. Many of these retailers engage in extensive advertising campaigns, publicize price comparison with retail competitors, employ "loss leader" sales and other customer enticement activities. In short, a wide range of factors influence their prices on literally thousands of products on a daily basis.

Finally, the Court concluded that allowing such a defense would reduce, not encourage treble-damage actions:

> In addition, if buyers are subjected to the passing-on defense, those who buy from them

would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness. 392 U.S. at 494, 88 S.Ct. at 2232.

The above quoted statement from *Hanover Shoe* seems especially applicable to the case before this court. Although plaintiffs have never established with any degree of certainty the individual damage sustained by any plaintiff in the purchase of infant formula (admittedly there has been no trial on the merits of the case) it is nevertheless quite clear that each plaintiff (and each member of a potential class) has only a "tiny stake" in this lawsuit.

In *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) the Supreme Court reaffirmed the *Hanover Shoe* holding and extended it to prohibit recovery of antitrust damages in almost all cases by indirect purchasers, and commented:

> Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the

> recovery among all potential plaintiffs that could have absorbed part of the overcharge — from direct purchasers to middlemen to ultimate customers. However, appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness. 431 U.S., at 737, 97 S.Ct., at 2070.

Once again the Court addressed economic theories:

> Under an array of simplifying assumptions, economic theory provides a precise formula for calculating how the overcharge is distributed between the overcharged party (passer) and its customers (passees), If the market for the passer's product is perfectly competitive; if the overcharge is imposed equally on all of the passer's competitors; and if the passer maximizes its profits, then the ratio of the shares of the overcharge borne by passee and passer will equal the ratio of the elasticities of supply and demand in the market for the passer's product. Even if these assumptions are accepted, there remains a serious problem of measuring the relevant elasticities — the percentage change in the quantities of the passer's product demanded and supplied in response to a one percent change in price. . . .

* * * * * *

> More important, as the *Hanover Shoe* Court observed, 392 U.S., at 493, 88 S.Ct., at 2231, 'in the real economic world rather than an economist's hypothetical model,' the latter's drastic simplifications generally must be abandoned. Overcharged direct purchasers often sell in imperfectly competitive markets. They often compete with other sellers that have not been subject to the overcharge; and their pricing policies often cannot be explained solely by the convenient assumption of profit maximization. . . . 431 U.S., at 741-742, 97 S.Ct., at 2072-2073.

This court's earlier comment, regarding competition at the retail level among retailers of products like infant formulas, applies equally here. An economist's hypothetical model which fails to take into account those real world facts would be of little value and would surely confuse the jury.

Finally, the Court concluded:

> We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws, [citation omitted] supports our adherence to the *Hanover Shoe* rule, under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge. We recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with

> their suppliers. But on balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws [citation omitted] is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it. 431 U.S., at 745, 97 S.Ct., at 2074.

In this court's view, the concerns expressed by the Supreme Court apply equally to the Louisiana statute and to this case. A few observations demonstrate why this is so.

First, there is no dispute that antitrust litigation is expensive and complex. Price fixing conspiracies are not ordinarily formulated out in public and they are frequently difficult and expensive to ferret out. To that may be added the cost of expensive expert witnesses whose testimony is always essential in the proof of damages. The notion that an ultimate consumer having purchased at retail and claiming only a "tiny stake" in the outcome would be encouraged to initiate expensive, complex, and time consuming litigation for small change, simply cannot be accepted.

Moreover, most retail purchasers have no access to information which might even indicate to them that there had been an illegal overcharge in the price of a product at the manufacturers level of the product. This very litigation demonstrates the correctness of such concerns.

Appendix D

It is undisputed, as noted above, that the direct purchasers of infant formula from these defendants have brought antitrust acti under federal law which have already been settled. The same set of lawyers who represented the direct purchasers in the federal action also represent these plaintiffs in this state law class action. While the court is not privy to all of the matters undertaken in the original action, it is certainly fair to conclude that but for the evidence obtained in the original federal action by the lawyers who now represent these plaintiffs, this action would never have been brought. It is highly unlikely that a consumer of such a product would ever obtain information which could lead him or her to suspect that a price fixing scheme at the top of the distribution chain has increased the retail price of the product by a few cents per unit at the supermarket.

In an antitrust price fixing case, plaintiff must first prove price fixing before reaching the question of damages. The court is confident that in this case the same evidence of conspiracy obtained in the federal antitrust cases against these defendants would be offered. Such evidence is available in this class action only because of the happenstance that counsel for plaintiffs represented the direct purchasers and now represents the class action plaintiffs — and thus has access to the information.

While class actions are valuable for the prosecution of some actions with many claimants, each having small damage, the device is not likely to be useful in antitrust consumer cases involving products such as infant formula. A consumer who discovers a defect in a mass marketed product may be able to establish the defect at little or no cost, and he will ordinarily discover the defect without expert

Appendix D

assistance. In those instances, the defect in the other products of the same type as bought by plaintiff may be proved at moderate cost, i.e., if one manufacturer produced and distributed thousands of defective units, it is efficient and economic to prosecute a class action on behalf of representative plaintiffs and all others who bought the product. Individual damage will also be relatively simple and inexpensive to prove.

Not so with price fixing schemes involving products such as infant formula. A consumer buying at retail will know the retail price he pays for the product but in the absence of a situation like the present case would not even have a suspicion, much less actual evidence, that the retail price he paid has been increased by an illegal scheme among the manufacturers. In other words, it seems to this court that in the case of price fixing by manufacturers of mass-marketed products such as infant formula, the ultimate consumer is likely to be the last to know and is the least likely to have the resources to discover and prove such a scheme.

To illustrate the preceding statement, diligent search by this court has failed to produce a single other reported case in Louisiana alleging price fixing among manufacturers of consumer products such as infant formula. What is now La. R.S. 51:122 traces back to Act 86 of 1890, a period of over one hundred years.

It seems to this court that the federal construction of the damages issue is sound — those with the most to gain in a treble-damage action are not only most likely to bring the action but also are more likely to have access to the information regarding illegal price increases and the

resources to finance the litigation than those ultimate consumers who may have borne part of the pass-on price increase.

The federal concerns about economic theory also apply to this case. As counsel for the defendants have repeatedly pointed out during the course of this litigation, counsel for plaintiffs propose to use the same economic expert here as they used in the original federal litigation brought by the direct purchasers. There the expert testified that the direct purchasers sustained all the damage, i.e., no direct purchaser was able to pass-on a single cent of the overcharge. Now that the original litigation has been concluded, the expert has simply turned his economic theoretical model by 180 degrees and is now prepared to testify that direct purchasers passed on **all of the overcharges,** so that the ultimate consumers sustained all of the damage.

At least one learned comment has pointed out that if indirect purchasers are allowed to sue, then the passing on defense must be allowed to the antitrust violators; otherwise multiple treble-damage liability will be tolerated by the law. See **William M. Landes and Richard A. Posner,** ***Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick,*** 46 University of Chicago Law Review 602, at 603.

Under such a scenario, the antitrust victims could well find themselves at each others throats in court, proffering differing economic theories as to who passed on the overcharge to whom. The complexity and cost of such proceedings could be almost beyond comprehension,

depending upon the sophistication of the particular distribution chain (or chains) of the product (or products).

This court certainly recognizes that the Louisiana Legislature may adopt a law which grants a cause of action in favor of indirect purchasers of products and the Supreme Court has clearly stated that there is no federal impediment to so doing. *See Calif. v. ARC America Corp.,* 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989).

The fact, however, that in 1981, following the decision in *Illinois Brick,* the Louisiana legislature declined to amend the Louisiana antitrust statute so as to specifically authorize such actions, is at least a straw in the wind indicating that Louisiana was satisfied with the result of *Illinois Brick.* See (H.B., 772 of 1981, introduced but not adopted by the 1981 Louisiana Legislature.)

This court, for the reasons outlined above, concludes that Louisiana would be on sound ground in following the lead of the Supreme Court in *Hanover Shoe* and *Illinois Brick* and holds that these indirect purchasers have suffered no antitrust damage under Louisiana's antitrust law, La. R.S. 51:137.

Dismissal Under Louisiana Civil Code Articles 2315 and 1953

Plaintiffs have also failed to state a claim under Louisiana Civil Code articles 2315 and 1953. First, a violation of article 2315 requires proof of "fault" on the part of defendants. The only "fault" that plaintiffs assert is defendants' alleged violation of La. R.S. 51:122. Because

the court finds that plaintiffs have failed to assert a claim under this statute, plaintiffs should not be able to bypass such a finding by asserting an action under article 2315.

Second, plaintiffs acknowledge that in order to state a cause of action under Louisiana Civil Code article 1953, a contractual relationship must be alleged.[8] As indirect purchasers, plaintiffs cannot assert the existence of any such obligation. Plaintiffs argue, however, that an action for fraud may also be alleged in tort under Article 2315 which would not require plaintiffs to establish such elements as privity, consideration, or breach of contract. Because the court has concluded that plaintiffs have failed to state a cause of action for liability for antitrust activity under Article 2315, the court holds the same for a cause of action for fraud.

The Other Argument of Defendants

The defendants also advance the argument that the Louisiana statute, La. R.S. 51:122, applies only to intrastate price fixing scheme and that the conspiracy as alleged by plaintiffs is clearly interstate, not intrastate. Hence, defendants argue, the Louisiana statute has no application to their alleged activities.

In view of the conclusion of the court as to the construction of section 137, the court does not express any view on this argument.

Accordingly, for the reasons set forth above, defendants' motion to dismiss for failure to state a claim is hereby GRANTED and this action will be dismissed.

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8. Plaintiffs' supplemental memorandum, p. 26.

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED AND FILED NOVEMBER 7, 1997

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 93-971-A

ROBIN FREE AND RENEE FREE

VERSUS

ABBOTT LABORATORIES, BRISTOL-MEYERS SQUIBB COMPANY, MEAD JOHNSON & COMPANY

JUDGMENT

For the written reasons assigned and filed herein:

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the motion to dismiss filed on behalf of defendants is hereby GRANTED, and this action is hereby DISMISSED.

Baton Rouge, Louisiana, November 7, 1997.

s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX F — RULING OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA ON MOTION FOR RECONSIDERATION DATED AND FILED APRIL 22, 1997

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 93-971-A

ROBIN FREE AND RENEE FREE

VERSUS

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB COMPANY, MEAD JOHNSON & COMPANY
ROBIN FREE AND RENEE FREE

RULING ON MOTION FOR RECONSIDERATION

This matter is before the court on a motion by defendants, Abbott Laboratories ("Abbott") and Bristol-Myers Squibb Company and Mead Johnson & Company (together "Bristol"), for reconsideration of the court's January 21, 1997 ruling. The motion is strongly supported by plaintiffs. Removal jurisdiction is based upon 28 U.S.C. §1332. In a prior ruling, this court held that there is diversity of citizenship jurisdiction in this case which ruling was affirmed, although the court's attempt to remand the action to state court on the grounds of comity was reversed. See, 51 F.3d 524 (5th Cir. 1995).

Appendix F

Background

Plaintiffs filed this action in the Louisiana state court seeking damages for economic loss including treble damages, attorney fees, and legal interest for unreasonable restraint on trade in violation of state law. Plaintiffs purported to file this lawsuit on behalf of themselves and a class of consumers of infant formula who reside in the state of Louisiana and at any time during the period of January 1, 1980, through December 31, 1992, purchased one or more of the defendants' brand of infant formula in the state of Louisiana.

On February 23, 1996, defendants filed a motion to dismiss and a motion for summary judgment. Plaintiffs opposed the motion and the court granted leave for the parties to file reply briefs and supplemental briefs. Before the court ruled on the pending motions, plaintiffs and defendants filed a joint motion for preliminary approval of settlements between the parties. The court preliminarily approved the settlement of this litigation in two stages. The first partial settlement was with Abbott, which was preliminarily approved by this court on May 31, 1996. The second partial settlement was with Bristol-Myers and Mead Johnson, which was preliminarily approved by this court on September 6, 1996.

On October 10, 1996, plaintiffs moved for final approval of the settlements. No class having been certified at that time, the court tentatively certified a class for settlement purposes only and preliminarily approved the settlements. A fairness hearing was fixed for December 16, 1996, and notice was given in accordance with Rule 23(e), Fed.R.Civ.P. After

careful consideration of the matter, the court, on January 21, 1997, denied the motion by plaintiffs for final approval of settlements entered into with defendants. See **Free v. Abbott Laboratories,** 953 F.Supp. 751 (M.D. La. 1997). The court concluded that the proponents had failed to present sufficient evidence to demonstrate that the settlement secured an adequate advantage for the absentee class in return for the surrender of litigation rights against defendants and set forth its reasons in detail. **Id.** at p.p. 753-756.

Discussion

No objections were made at or before the fairness hearing. Nonetheless, the proponents of the settlement still bore the burden of proving and persuading the court that the settlement was fair, adequate and reasonable. Indeed, the proponents should have been extra cautious knowing that, because the class had been certified for settlement purposes only, the court was obligated to be especially careful in reviewing the settlements. **In re General Motors Corp. Pick-Up Truck Fuel Tank,** 55 F.3d 768, pp. 786-792 (3rd Cir. 1995).

Although the court has no evidence to suggest that this settlement was anything other than the product of arm's length negotiations between plaintiffs and defendants, the court could not assume that the settlement was prima facie fair; rather, the court had a duty to review the evidence presented to determine whether the settlement was fair to the absentee class. Upon review of the matter, the court realized that the proponents had failed to furnish significant evidence regarding many of the factors the court was to

consider. The fairness hearing itself provided the court with very few facts relevant to the fairness of the settlement.[1] Indeed, plaintiffs concede in their brief for reconsideration that "[p]laintiffs' attorneys now recognize that, as a result of the limited written submissions, received from one side only, a number of issues were only partly addressed or treated summarily."[2]

The court recognizes that the burden of persuasion of the fairness of a class action settlement does not require the proponents to stage a trial on the merits — the event which the settlement aims to preclude. The burden of proof and persuasion, however, did obligate the parties, the main source of information, to furnish adequate information. The court, unfortunately, was required to probe the record to access the most basic information. For instance, the proponents argued that the settlement was fair in light of the possible range of recovery to the plaintiffs and the class. The brief in support of the final approval of the settlement offered assumptions but no affidavits or other factual information to support the asserted loss that each class member would surrender in exchange for the settlement. Proponents only contended that the settlement was "unquestionably superior

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1. Plaintiffs did state that no objections had been filed as of that date, approximately four hundred thousand claims had been filed, that this settlement has been approved in every state where it has been presented and that each class member could expect to get about ten dollars as result of the settlement.

2. Plaintiffs' memorandum in support of defendants' motion for reconsideration of settlements on the basis of additional submissions, p. 3.

to another possibility: that no recovery would be obtained after years of further litigation." As the court noted, this possibility is always present in litigation and is not helpful to the court. **Free,** 953 F.Supp. at 753. Lacking hard information, the court referred to the original state court petition and the memorandum on behalf of plaintiffs filed on December 13, 1993, in support of their motion to remand. There plaintiffs argued that "the evidence will establish that a parent purchasing infant formula has been defrauded out of about $835.35 per year per infant." The court reasoned that because counsel at that time was attempting to establish that the claims were all well below the then $50,000 federal jurisdictional amount, it would assume that the sum of $835.35 per year per child was the absolute minimum amount that a jury would be asked to award. The court, therefore, used this figure in evaluating the range of recovery.

Counsel now state in their brief for reconsideration that the $835.35 figure is incorrect. Counsel state:

> Since the settlement proponents had not provided any more recent or more refined damages data, the Court relied on those figures [$835.35] in the January 21st Ruling. Plaintiffs' preliminary estimate was made before they had the benefit of the extensive work and damages analyses of their economic experts. Defendants have noted that, nearly two years later, when plaintiffs' expert testified at the trial of the Kansas case, the estimated overcharge per infant was about $130.[3]

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3. Plaintiffs' memorandum in support of defendants' motion for reconsideration of settlements on the basis of additional submissions, p. 5.

However, to now submit this information, along with a two inch plus thick binder of exhibits, on a motion for reconsideration is inappropriate.

A motion for reconsideration in the district court can be likened to a motion for new trial or, at the appellate level, a motion for rehearing. It is assumed that everything necessary to resolve all issues will be presented to the court at the scheduled hearing.

Reconsideration is appropriate only if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. **Multnomah County, Oregon v. AcandS, Inc.,** 5 F.3d 1256, 1262 (9th Cir. 1993). Certainly, this newly **submitted** evidence is not newly ***discovered*** evidence. The court has reviewed the documents now offered in support of approval and determines that all of them were available to the parties well before the hearing on the issue of fairness to the absent class members. As the Ninth Circuit noted in **Multnomah County,** the overwhelming weight of authority is that the failure to file documents in an original motion or opposition does not turn the late filed documents into "newly discovered evidence." *See also* **Waltman v. International Paper Co.,** 875 F. 2d 468 (5th Cir. 1989) (finding that because all of the material attached to plaintiffs motion for reconsideration was available to plaintiff at the time she filed her motion in opposition to defendants summary judgment motion and because she did not give any explanation why she did not include the materials with her motion in

opposition, the material attached was untimely); **Harsco Corp. v. Zlotnicki,** 779 F. 2d 906,909 (3rd Cir. 1985) (stating that where evidence is not newly discovered, a party may not submit that evidence in support of a motion for reconsideration).

Neither plaintiffs nor defendants argue in the motion for reconsideration that any of these grounds are present, particularly that this was newly discovered evidence justifying reconsideration of the court's ruling; rather, the evidence purportedly clarifies the arguments and positions already presented to this court. Because these exhibits could have been adduced at the fairness hearing and because the proponents failed to take the proper steps to insure consideration of the evidence, the court declines to allow proponents to slip it into the record through a motion for reconsideration. Courts, especially this court, lack the time and resources to reconsider rulings because the parties failed to present their most solid and convincing evidence at the scheduled hearing. See, **Comeau v. Rupp,** 762 F.Supp. 1434, 1451 (D. Kan. 1991), **United States ex rel. Houck v. Folding Carton Admin. Comm.,** 121 FRD 69, 71 (N.D. Ill. 1988)(stating that an improper use of the motion to reconsider "can waste judicial resources and obstruct the efficient administration of justice).

Defendants' motion for reconsideration is hereby DENIED. The court will proceed on the defendants' pending motions for dismissal and summary judgement. All parties are hereby granted leave to submit additional affidavits, evidence and briefs on those motions within thirty (30) days

of the date of this ruling, after which the motions will be considered submitted.

Baton Rouge, Louisiana, April 22, 1997.

s/ John V. Parker
JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX G — RULING OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA ON MOTION FOR FINAL APPROVAL OF SETTLEMENTS AND ATTORNEY FEES DATED JANUARY 21, 1997

Robin FREE and Renee Free

v.

ABBOTT LABORATORIES, Bristol-Myers Squibb Company, Mead Johnson & Company.

Civil Action No. 93-971-A.

United States District Court,
M.D. Louisiana.

Jan. 21, 1997.

* * *

RULING ON MOTION FOR FINAL APPROVAL OF SETTLEMENTS AND ATTORNEY FEES

JOHN V. PARKER, Chief Judge.

This matter is before the court on a motion by plaintiffs for final approval of settlements entered into with defendants, Abbott Laboratories ("Abbott") and Bristol-Myers Squibb Company and Mead Johnson & Company (together

"Bristol"). Also pending before the court is a joint application of plaintiffs' counsel for an award of attorneys' fees and reimbursement of expenses. Neither motion is opposed. Removal jurisdiction is allegedly based upon 28 U.S.C. § 1332 and in a prior ruling the court has held that there is diversity of citizenship jurisdiction in this case.

Motion for Final Approval of Settlement

Background

On October 14, 1993, plaintiffs filed this action seeking damages for economic loss including treble damages, attorney fees, and legal interest. The plaintiffs allege that defendants entered a conspiracy to fix prices in violation of Louisiana's antitrust law, La.R.S. 51:122 et seq. Specifically plaintiffs allege, "an understanding and concert of action among defendants, the substantial terms of which were to raise, fix, maintain and stabilize at artificially high levels the wholesale price of infant formula sold in the United States, including the state of Louisiana." The plaintiffs purportedly filed this lawsuit on behalf of themselves and a class of consumers who purchased one or more of the defendants' brands of infant formula in the state of Louisiana at any time during the period of January 1, 1980 through December 31, 1992.

Plaintiffs have now entered settlement agreements with both defendants. The settlements provide that Abbott and Bristol will pay $2,350,000 and $2,000,000 respectively, with accruing interest, to settle the claims asserted against

each.[1] The settlements, if approved, would conclude this litigation.

No class having been certified when the motion was filed, this court tentatively certified a class for settlement purposes only, and preliminarily approved the two settlements. Notices of the settlements were published in newspapers throughout Louisiana as required by Rule 23(e), Fed.R.Civ.P.[2] The notice required class members to submit any objection they might have to the settlement administrator regarding the amount of the settlements, attorneys' fees, expenses, or plaintiffs' awards on or before December 2, 1996. The court has been informed that the administrator did not receive any objections by mail and that no persons have requested to opt out of the class.

On Monday, December 16, 1996, on a motion by plaintiffs, this court held a fairness hearing concerning final approval of the settlement agreements. Although the notices required prehearing written objections, the court announced that any person in the courtroom would be allowed to comment. No objections or comments were made by any member of the public in the courtroom.

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1. The settlement amount paid by Abbott has been earning interest since January 25, 1996 and the settlement amount paid by Bristol has been earning interest since June 7, 1996.

2. Rule 23(e) provides, "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

Law

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. Fed.R.Civ.P. 23(e). A class action settlement should be approved only when it is "fair, adequate, and reasonable." *In re Corrugated Container Antitrust Litigation,* 643 F.2d 195, 207 (5th Cir.1981). In making this determination, a district court should consider the following factors: the possible range of recovery and the certainty of damages; the factual and legal obstacles to prevailing on the merits; the stage of proceedings and the amount of discovery completed; the objections and opinions of absent class members as well as the opinions of class counsel and class representatives; whether the settlement was the product of collusion or fraud; and the complexity, expense, and likely duration of the litigation. *Reed v. General Motors Corp.,* 703 F.2d 170, 172 (5th Cir.1983).

Discussion

To protect the interests of the absentee class, this court has a duty to make an independent assessment of the fairness of the settlement. The court executes this duty by assuring that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights against the defendants. *See* 2 NewBerg & Conte § 11.46, at 11-105, 11-106. As the Third Circuit has recently pointed out, a district court must be especially careful in reviewing settlements which are presented through the use of a

settlement class. *In re General Motors Corp. Pick-Up Truck Fuel Tank,* 55 F.3d 768, pp. 786-792 (3rd Cir.1995).

To enable the court to reasonably assess the fairness of the settlement, the proponents[3] are obligated to furnish adequate information; counsel for the parties are the main source of information concerning the settlement. It is the proponents' burden to explain how the settlement was reached and to prove that it is fair, adequate, and reasonable. *Id.*

1) The Possible Range of Recovery and the Certainty of Damages

Proponents failed to furnish significant information about the estimate of the possible range of recovery which class members will surrender in exchange for the settlement. Proponents contend only that the settlement is "unquestionably superior to another possibility: that no recovery would be obtained after years of further litigation." Certainly, this possibility is always present in litigation and is indeed not helpful to the court in evaluating the possible range of recovery.

The original state court petition alleges that the value of any claim does not exceed $20,000, but does not reveal the basis for the estimate. The only other information furnished

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3. Both the plaintiffs and the settling defendants have come to a proposed compromise of the controversy, and both are interested in obtaining court approval. Both the plaintiffs and the settling defendants are the proponents of the settlement. Newberg and Conte § 11.42 at 11-95.

to the court regarding extent of damages is contained in a memorandum on behalf of plaintiffs filed December 13, 1993 in support of their motion to remand. In arguing that the claim of plaintiffs and the purported members of the class fall well below federal jurisdictional amount, counsel declares: "[t]he evidence will establish that a parent purchasing infant formula has been defrauded out of about $835.35 per year per infant." Brief of plaintiffs, p. 17.

The brief offers assumptions but no affidavits or other factual information to support the asserted loss figure. Since counsel at that time was attempting to establish that the claims were all well below the then $50,000 federal jurisdictional amount, the court must assume that the sum of $835.85 per year per child is the absolute minimum amount that a jury would be asked to award. Taking counsel at their word, the court concludes that each member of this absentee class will be required to surrender a claim worth at least $2507.55 (antitrust damages are trebled) per child per year under the terms of the settlement now proposed to the court.

Under the terms of the proposed settlement agreement, counsel for plaintiffs would be paid one-third of the fund of $4,350,000, about one and one-half million dollars, plus litigation expenses (now totaling about $33,000). Each named plaintiff (class representative) would be awarded $1500. The balance of the fund, less notice costs and settlement expenses, would be distributed to the members of the class. According to counsel for plaintiffs, more than four hundred thousand claims had been filed as of the date of the fairness hearing. It does not take a mathematical wizard

to see that each individual $2500 claim will be surrendered for a payment of no more than four, five, or six dollars.

2) The Factual and Legal Obstacles to Prevailing on the Merits[4]

The court is aware of some of the issues faced by plaintiffs (and the members of the class) in prosecution of this action. They are raised by the pending motions filed by defendants.

One very important issue is whether the plaintiffs and class members indeed have standing to assert an antitrust claim under La.R.S. 51:122 *et seq.* This issue has not been addressed by a Louisiana court. Federal antitrust law is the model for Louisiana's law and Louisiana courts frequently follow federal precedent in this area. Since it is clear that indirect purchasers do not have standing under federal antitrust law, *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), this issue is quite serious. In addition to the standing problem, defendants raise other significant arguments regarding plaintiffs' ability to recover under Louisiana law. These arguments include plaintiffs' ability to demonstrate that the Louisiana antitrust statute is intended to cover interstate conspiracies and is not restricted to intrastate conspiracies since the conspiracy here, if there was one, was interstate. Again, this is an issue that has not been addressed by a Louisiana court.

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4. The court observes that all of these problems with the claims of plaintiffs were, or should have been, well known to experienced counsel before the action was commenced.

The court also recognizes the existence of evidentiary problems. One such evidentiary problem is whether the plaintiffs can prove that, as indirect purchasers, they sustained injuries, as opposed to the retailers who were direct purchasers from defendants. Defendants have submitted evidence in support of their pending motions that the expert upon whom plaintiffs most heavily rely for damages has already testified, in prior unrelated litigation brought by retailers, that the retailers absorbed the entire cost and no consumer was damaged.

The court essentially has no information regarding any weakness which might be found on the defense side, although there must be some, since the defendants have put up the sums of $2,350,000 and $2,000,000 respectively, not insignificant amounts, to buy their peace.

Although a cash settlement amounting to only a fraction of the potential recovery does not in itself render a settlement unfair or inadequate, the court finds that the members of this class would literally be no worse off if their case were tried to an adverse verdict. Plaintiffs may face serious and significant barriers to recovery in this case, but the members of the class (as opposed to class counsel, representative plaintiffs and defendants) have little to lose and everything to gain by pressing on to trial regardless of the alleged complexity and expense of continued litigation.

3) The Stage of Proceedings and the Amount of Discovery Completed

Another factor to consider is the stage of proceedings and the amount of discovery completed. Though the court

need not possess evidence to decide the merits of the issue, a court should be satisfied that class counsel had sufficient information to adequately assess the strength of the plaintiffs' claims. *In re Ford Motor Co. Bronco II Products Liability Litigation,* 1995 WL 222177, (E.D.La. April 12, 1995) (No. Civ. A. MDL-991).

This action is one of seventeen similar suits filed against the same defendants in different states. According to counsel for plaintiffs, the applicant law firms have worked as a team of national counsel in each of the related actions. Although the action has been pending here for about three years and some issues have been litigated and appealed, all such prior rulings related solely to the issue of subject matter jurisdiction. *See In re Abbott Laboratories,* 51 F.3d 524 (5th Cir.1995). The court has not yet addressed any issues related to the merits of the litigation, although, as noted above, there are now pending motions by the defendants to dismiss or alternatively for summary judgment which relate to the construction of Louisiana's antitrust statute.

Counsel have informed the court that extensive discovery[5] has taken place in all seventeen cases and that the action in Kansas was tried to verdict, which was in favor of defendants. The court has not been informed as to the details of the Kansas verdict, such as whether the jury factually found no conspiracy or whether the result was dictated by some peculiar feature of Kansas law.

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5. In brief, counsel furnished the names of 26 people whose depositions have been taken but no information as to what they said has been submitted to the court.

In short, although sufficient discovery may have been conducted, the court has little information relating to the factual bases of the claims made by either side.

4) The Absence of Opposition

Plaintiffs' counsel argue that the fact that no objections have been received from any of the "many thousands of class members firmly supports final approval of the settlements." The lack of objection may not indicate general approval among members of the absentee class. As one court has stated:

> [a] low level of vociferous objection is not necessarily synonymous with jubilant support. In many class actions, the vast majority of class members lack the resources either to object to the settlement or to opt out of the class and litigate their individual cases. *In re Corrugated Container Antitrust Litigation,* 643 F.2d 195, 217-18 (5th Cir.1981).

That situation exists with the class members in this litigation. This settlement class is composed of parents who have children now between the ages of four and sixteen. It is reasonable to assume that few of them possess sufficient time, knowledge, and resources to follow the procedures set forth in the notices for objecting or opting out of the class.

Moreover, as counsel acknowledged at the fairness hearing, the wording of the notices caused some confusion among class members. The notices which were published in

Louisiana announce that an award of $1500 to each **named plaintiff** will be sought from the court. Counsel indicated that some members of the class have interpreted that to mean that each **member of the class** will receive the sum of $1500, rather than the four or five dollars each class member is likely to receive. This confusion among class members is of significant concern to the court. Those class members who think they are going to receive a $1500 windfall are unlikely to raise many objections.

5) Whether the Settlement was the Product of Collusion or Fraud

A court must insure that the settlement was the result of arm's length negotiations and not the result of fraud or collusion. Though no evidence exists that this was anything other than an arm's length transaction, we must still recognize one of the dangers inherent in class action settlements — "that class counsel 'is potentially an unreliable agent of his principals' and may try to 'sell out' the class in exchange for substantial attorneys' fees." *In re Ford Motor Co.*, 1995 WL 222177 at 6 citing *Mars Steel Corporation v. Continental Illinois National Bank and Trust Company of Chicago*, 834 F.2d 677, 681 (7th Cir.1987).

In discussing the possibility of collusion in class actions, the court in *Bowling v. Pfizer, Inc.* 143 F.R.D. 141, 152 (S.D.Ohio 1992) recognized that "[a] defendant has an interest in minimizing its liability; class counsel has an interest in his attorney's fees." Stated another way, the possibility exists, particularly in settlement class action proposals, that "substantial rights of the class may be

bargained away in exchange for relief which inures primarily to the named plaintiffs or to class counsel." *Holden v. Burlington Northern, Inc.*, 665 F.Supp. 1398, 1406 (D.Minn.1987) citing *Armstrong v. Board of School Directors of the City of Milwaukee et al.*, 616 F.2d 305, 313 (7th Cir.1980).

Such a concern is present in this case. Counsel for plaintiffs argue in their motion for attorneys' fees that the settlement represents 7.7% of the gross amount which plaintiffs' experts estimated as damages for purchases in Louisiana and argue that in light of the significant legal problems[6] faced by the plaintiffs the "settlements constitute an excellent result." On the basis of the record before it, the court disagrees. The court does not find that plaintiffs' counsel has tried to "sell out" the class in exchange for substantial attorney's fees, and the court does find that the proposed settlement is fair, adequate and reasonable to the class representatives, to class counsel, and to the defendants. The record does not establish that it is fair, adequate and reasonable to the members of the absentee class.

Accordingly, after careful consideration, the court finds that the proponents have failed to present sufficient information to allay the concerns of the court. The motion for final approval of the settlement is hereby DENIED. Because the settlement is not approved, the court does not reach counsel's motion for attorneys' fees and reimbursement of expenses.

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6. The court again notes that these problems were all known before suit was filed.

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA PRELIMINARILY APPROVING PARTIAL SETTLEMENT, SETTING HEARING, AND DIRECTING NOTICE TO THE CLASS DATED AND FILED MAY 31, 1996

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 93-971-A-M1

JUDGE PARKER
MAGISTRATE JUDGE RIEDLINGER

ROBIN FREE AND RENEE FREE,

Plaintiffs,

vs.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB COMPANY, and MEAD JOHNSON & COMPANY,

Defendants.

ORDER PRELIMINARILY APPROVING PARTIAL SETTLEMENT, SETTING HEARING, AND DIRECTING NOTICE TO THE CLASS

WHEREAS, an action is pending before the Court entitled *Free v. Abbott Laboratories, et al.*, Case No. 93-971-A-MI (the "Litigation"); and

WHEREAS, Plaintiffs and Defendant Abbott Laboratories ("Abbott"), having made application for an order approving the partial settlement of this Litigation in accordance with a Settlement Agreement dated March 26, 1996 (the "Settlement Agreement" or "the "Agreement"), which, together with the exhibits annexed thereto, sets forth the terms and conditions for a proposed partial settlement of the Litigation and for dismissal of the Litigation as to Abbott Laboratories with prejudice upon the terms and conditions set forth therein; and the Court having read and considered the Agreement and the exhibits annexed thereto; and

WHEREAS, the Court is satisfied that this Settlement has been negotiated at arm's-length and in good faith; and

WHEREAS, all capitalized terms contained herein shall have the same meanings as set forth in the Agreement.

IT IS HEREBY ORDERED:

1. For purposes of this Settlement, the Court hereby certifies a Settlement Class which shall consist of all persons who purchased one or more brands of Defendants' Infant Formula Products, except for infant formula sold under the Gerber brand name, from a retail store in Louisiana during the period from January 1, 1980 through and including December 31, 1992, with the Plaintiffs herein to serve as representatives of the Settlement Class and their counsel to serve as counsel to the Settlement Class ("Plaintiffs' Counsel"). The Settlement Class is being certified for the benefit of and with the consent of the parties to the settlement and is without prejudice to any further determination as to

whether a class can or should be certified with regard to any claims made against Bristol-Myers Squibb Company and Mead Johnson & Company.

2. A hearing will be held in the Courtroom of the undersigned at the United States Courthouse, 777 Florida Street, Baton Rouge, Louisiana, on a date to be subsequently scheduled, for the purposes of determining whether the proposed Settlement, on the terms and conditions set forth in the Settlement Agreement attached hereto as Exhibit 1, is fair, reasonable and adequate, and should be approved by the Court; whether the claims against Abbott should be dismissed on the merits, with prejudice and without costs to any party, and to consider the application of Plaintiffs' Counsel for an award of fees and expenses. This hearing may be continued from time to time without further notice.

3. The Court does hereby preliminarily approve the settlement as being fair, reasonable and adequate.

4. Plaintiffs' Counsel are hereby authorized to retain Rust Consulting, Inc. to supervise and administer the notice procedure. Plaintiffs' Counsel are authorized to withdraw up to $3,000 from the Settlement Fund to pay the expenses thus incurred. Plaintiffs' Counsel may withdraw such other amounts as may become necessary, subject to Court approval.

5. No later than July 14, 1996, the form of notice substantially in the form attached hereto as Exhibit 2, shall be published in the newspapers listed in the attachment thereto. No later than three weeks after the foregoing publication, a summary form of notice substantially in the

form attached hereto as Exhibit 3 shall be published in *USA Today*. Proof of publication of such notice shall be filed by Plaintiffs' Counsel at, or prior to, the final hearing. The aforesaid notice is hereby authorized and approved. Plaintiffs' Counsel are hereby authorized to withdraw up to $18,000 from the Settlement Fund to pay for such notice, and the disbursement of funds and payments required to do so are hereby approved. Plaintiffs' Counsel may withdraw such other amounts as may become necessary, subject to Court approval.

6. All persons who do not timely and properly request exclusion from the Settlement Class shall be bound by all determinations and judgments in the litigation concerning the settlement, whether favorable or unfavorable to the Settlement Class.

7. Any person may request exclusion from the Settlement Class by sending a request in writing by first class mail, postage prepaid, postmarked on or before the date 45 days after the national publication of the summary notice, to:

Settlement Administrator
Infant Formula Litigation
P.O. Box 1602
Minneapolis, MN 55440-1602

and referring, both in the Request for Exclusion and on the envelope, to the name and number of the Litigation. *Free v. Abbott Laboratories, et al.*, Case No. 93-971. Such request shall state the name and address of the person requesting

exclusion from the Settlement Class and that such person elects to be excluded from the Settlement Class and from any judgment entered pursuant to this Settlement. Any person who chooses to be excluded from the Settlement Class will not be bound by any judgment entered in connection with this Settlement. Persons who do not elect to be excluded from the Settlement Class in this manner will be bound by the terms of this Settlement, if they are finally approved by the Court, and by any orders and judgment entered in connection therewith.

8. Any person who does not elect to be excluded from the Settlement Class may, but need not, enter an appearance through that Settlement Class member's own attorney. Settlement Class Members who do not enter an appearance through their own attorneys will be represented by the Plaintiffs as class representatives and their counsel, whose fees and expenses will be paid out of the Settlement Fund, pursuant to Court approval.

9. In the event the Settlement is finally approved, any distribution to Settlement Class Members will be deferred pending resolution of the remainder of the Litigation. Plaintiffs' Counsel will then be required to submit a proposed plan of distribution, including a procedure for the submission of claims by Settlement Class Members, for consideration by and subject to the approval of the Court.

10. Pending final determination of whether the Settlement should be approved, neither the Plaintiffs nor any Settlement Class Member, either directly, representatively, or in any other capacity, shall commence or prosecute against

Abbott, any action or proceeding in any court or tribunal asserting any of the Released Claims.

11. Any Settlement Class member may appear at the hearing and show cause why the Settlement should not be approved as fair, reasonable and adequate; why attorneys' fees and costs should not be awarded to Plaintiffs' Counsel in the amount requested; or why this Action should not be dismissed with prejudice as to Abbott. In order for a Settlement Class Member to have any objections considered at the hearing, that Settlement Class Member must file a statement setting forth each ground for objection and attaching any supporting papers such Settlement Class Member wishes the Court to consider. This statement must be addressed to:

Settlement Administrator
Infant Formula Litigation
P.O. Box 1602
Minneapolis, MN 55440-1602

referring on the envelope to *Free v. Abbott Laboratories, et al.*, Case No. 93-971, and must be delivered, or, if mailed, postmarked not later than the date 45 days after the national publication of the summary notice. Any objections must also be served on counsel for Abbott:

Leslie M. Smith, Esq.
Kirkland & Ellis
200 East Randolph Drive
Chicago, IL 60601

Appendix H

Plaintiffs' Counsel shall collect and organize all objections and comments received by the Settlement Administrator for submission to and filing with the Court prior to the Hearing. The filing of an objection shall not extend the time within which a Settlement Class Member may file a Request for Exclusion from this Settlement. Any Settlement Class Member who does not make his or her objection in the manner provided shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness, reasonableness or adequacy of the proposed Settlement as incorporated in the Settlement Agreement and shall forever be foreclosed from seeking review of the State Settlement by appeal or otherwise unless otherwise ordered by the Court.

12. It shall be the responsibility of Plaintiffs' Counsel to provide counsel for Abbott with a final list including the names of all individuals who have timely requested exclusion from the Settlement Class. In the event that more than 2,000 persons submit timely and valid Requests for Exclusion from the Settlement Class, Abbott shall have the right within 15 days after Plaintiffs' Counsel has notified counsel for Abbott of the names of each individual electing to opt out of the Settlement Class, to withdraw from this Settlement, in which event the case will proceed as to Abbott. Abbott's right shall be exercised, if at all, within such 15-day period by service of written notice of the election to withdraw from the Settlement and terminate the Settlement Agreement, on Plaintiffs' Counsel by certified mail and by filing a copy of such notice with the Court. In the event Abbott exercises its right to withdraw from the Settlement and terminate the Settlement Agreement: (a) the Settlement Agreement shall

Appendix H

be null and void and shall have no further force and effect and shall be without prejudice to the rights and contentions as between Abbott and Plaintiffs and Settlement Class Members in this action; (b) the Settlement Fund, along with any interest thereon or proceeds therefrom, less any disbursements from the Settlement Fund with Court approval made before Abbott's withdrawal, promptly shall be refunded to Abbott; and (c) the Settlement Class shall be decertified.

13. No person who is not a Plaintiff or Settlement Class Member or Counsel to the Plaintiffs shall have any right to any portion of or in the distribution of, the Settlement Fund unless otherwise ordered by the Court or otherwise provided in the Agreement.

14. All papers in support of the Settlement and any application by Plaintiffs' Counsel for an award of attorneys' fees and expenses shall be filed at least seven (7) days prior to the Hearing.

15. All reasonable costs incurred in notifying Class Members, as well as administering the Settlement Fund, shall be paid as set forth in the Settlement Agreement.

16. The Court reserves the right to adjourn the date of the Hearing and any adjournment thereof without further notice to the Settlement Class, and retains jurisdiction to consider all further applications arising out of or connected with the proposed settlement.

Dated: MAY 31, 1996.

s/ John V. Parker
John V. Parker
United States District Judge

APPENDIX I — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED SEPTEMBER 21, 1995

In re ABBOTT LABORATORIES, Bristol-Meyers Squibb Company, Inc., and Mead Johnson & Company, Petitioners.

Robin FREE and Renee Free,
Plaintiffs-Appellees,

v.

ABBOTT LABORATORIES, Bristol-Meyers Squibb Company, Inc., and Mead Johnson & Company,
Defendants-Appellants.

Nos. 94-30279, 94-30280.

United States Court of Appeals,
Fifth Circuit.

Sept. 1, 1995.

* * *

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion 4/24/95, 5 Cir., 51 F.3d 524)

Before HIGGINBOTHAM, SMITH and PARKER, Circuit Judges.

Appendix I

PER CURIAM:

Treating the Suggestions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestions for Rehearing En Banc are DENIED.

We express no opinion regarding class certification or the exercise by the district court of discretion under 28 U.S.C. § 1367 to decline supplemental jurisdiction should a more well developed record warrant its doing so. We decline to further explore now on this record the complexities of declining to exercise jurisdiction under § 1367.

APPENDIX J — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED APRIL 24, 1995

In re ABBOTT LABORATORIES, Bristol-Meyers Squibb Company, Inc. and Mead Johnson & Company, Petitioners.

Robin FREE and Renee Free,
Plaintiffs-Appellees,

v.

ABBOTT LABORATORIES, Bristol-Meyers Squibb Company, Inc. and Mead Johnson & Company,
Defendants-Appellants.

Nos. 94-30279, 94-30280.

United States Court of Appeals,
Fifth Circuit.

April 24, 1995.

* * *

Before HIGGINBOTHAM, SMITH and PARKER, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This class action brought under the antitrust laws of the State of Louisiana requires that we decide whether the Judicial Improvements Act of 1990 overrules *Zahn v.*

International Paper Co., 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). We hold today that it does. We agree with the district court that the claims of the class representatives met the requisite amount in controversy and that it had diversity jurisdiction over their claims, but disagree with its decision to abstain from exercising it. We agree with the district court that it had supplemental jurisdiction over all other members of the class, but disagree with its decision not to exercise it. We vacate the order remanding to state court.

I.

Robin and Renee Free filed suit in a Louisiana state court on October 14, 1993, alleging that Abbott Laboratories, Bristol-Meyers Squibb Company, Inc., and Mead Johnson & Company had conspired to fix infant formula prices. The Frees filed for themselves and for a class[1] of Louisiana consumers. Defendants removed to federal court, and plaintiffs moved to remand.

The federal district court granted the motion to remand. The court held that it lacked federal question jurisdiction and that it had diversity jurisdiction only over the named plaintiffs' claims and not over claims of the other members of the class. The district court declined to exercise supplemental jurisdiction because the claims raised "novel issues of state law."

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1. The district court has not certified a class. Our examination of jurisdiction reflects the allegation of the plaintiffs and their invocation of jurisdiction — a putative class.

The district court remanded the named plaintiffs' claims on "the basis of . . . the *Colorado River/Moses H. Cone* doctrine of abstention."[2] It did so to avoid piecemeal litigation and to permit Louisiana to rule on the "novel and complex issues of state law." Defendants both appeal and petition for mandamus, asking that we vacate the order remanding to state court.

II.

28 U.S.C. § 1447(d) shields from review orders remanding for lack of subject matter jurisdiction, *see In re Shell Oil Co.*, 932 F.2d 1518, 1520 (5th Cir.1991), *cert. denied*, 502 U.S. 1049, 112 S.Ct. 914, 116 L.Ed.2d 814 (1992), or a defect in removal procedure noted by timely motion, *see In re Medscope Marine Ltd.*, 972 F.2d 107, 110 (5th Cir.1992). *See Thermtron Prods. Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976).

Fairly read, the remand order did not rest upon a lack of subject matter jurisdiction or defective removal procedure. The court noted no flaw in the removal procedure, and its decision to abstain follows an explicit finding of subject matter jurisdiction. Our appellate jurisdiction follows. *See In re International Paper Co.*, 961 F.2d 558, 561 (5th Cir.) (authorizing review by appeal, not mandamus, where remand is based upon "circumstances that give the court discretion

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2. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

to dismiss the case"), *cert. denied*, __ U.S. __, 113 S.Ct. 326, 121 L.Ed.2d 245 (1992); *McDermott Int'l v. Lloyds Underwriters of London*, 944 F.2d 1199, 1203-04 (5th Cir.1991) (regarding remand based upon *Colorado River* as discretionary and thus reviewable by appeal, not mandamus).

III. DIVERSITY AND SUPPLEMENTAL JURISDICTION

A. DIVERSITY JURISDICTION: THE NAMED PLAINTIFFS' CLAIMS

The court found it had diversity jurisdiction over the named plaintiffs' claims even though each named and unnamed plaintiff claimed only $20,000, less than the $50,000 minimum for diversity jurisdiction. 28 U.S.C. § 1332(a). The district court found that Louisiana law attributed all of a class's attorney's fees to the named plaintiffs. It held that the claim of the named plaintiffs for $20,000 — once swelled by attorney's fees — met the $50,000 amount-in-controversy requirement.

Plaintiffs argue that Louisiana statutes distribute the fees pro rata to all members of the class, with the result that none meets the amount-in-controversy requirement.

The distribution of attorney's fees centers on two Louisiana statutes. The first, Article 595 of the Louisiana Code of Civil Procedure, provides:

> The court may allow the representative parties their reasonable expenses of litigation, including

attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class.

. . . . .

Official Revision Comments

(a) It is intended, in the first paragraph, that the reasonable expenses of litigation allowed the successful representative parties is to be paid out of the fund or benefits made available by their efforts.

The second key Louisiana statute is Section 51:137 of the Louisiana Revised Statutes, which provides:

> Any person who is injured in his business or property by any person by reason of any act or thing forbidden by this Part may sue in any court of competent jurisdiction and shall recover threefold the damages sustained by him, the cost of suit, and a reasonable attorney's fee.

Article 595, plaintiffs contend, supports their argument that the fees are to be distributed among all class members. *See, e.g., White v. Board of Trustees,* 276 So.2d 714, 719 (La.Ct.App.) (deducting pro rata shares of an Article 595 attorney's fee from the awards due to each plaintiff), *writ ref'd,* 279 So.2d 694 (La.1973).

We disagree. Defendants pay attorney's fees and damages. The plain text of the first sentence of 595 awards the fees to the "representative parties." (The language allowing the "representative parties" their fees is echoed in Comment (a).)

Finally, plaintiffs argue that construing Article 595 to attribute the fees to the named plaintiffs — rather than to distribute them among all the plaintiffs — renders the statute unconstitutional. The argument continues that the federal courts have generally held that *Zahn* forbids attributing the fees of class members to class representatives. The only circuit court to speak to this question held that attributing a class's attorney's fees only to the named plaintiffs instead of pro rata to each member of the class "would conflict with the policy of *Zahn*." *Goldberg v. CPC Int'l, Inc.,* 678 F.2d 1365, 1367 (9th Cir.), *cert. denied,* 459 U.S. 945, 103 S.Ct. 259, 74 L.Ed.2d 202 (1982). Many district courts have followed *Goldberg*.[3] But *Goldberg*'s reading of *Zahn* sheds little light on the distinct policy choices behind Louisiana's decision regarding rights of recovery by class members. That a state chooses a set of rules that result in an award in excess of $50,000 frustrates no policy of *Zahn*. Simply put, under

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3. *See, e.g., Copeland v. MBNA Am., N.A.,* 820 F.Supp. 537, 541-42 (D.Colo.1993); *Mayo v. Key Fin. Servs. Inc.,* 812 F.Supp. 277, 278 n. 3 (D.Mass.1993); *Czechowski v. Tandy Corp.,* 731 F.Supp. 406, 410 (N.D.Cal.1990); *National Org. for Women v. Mutual of Omaha Ins. Co.,* 612 F.Supp. 100, 109 (D.D.C.1985); *see also Neve Bros. v. Potash Corp. (In re Potash Antitrust Litig.),* 866 F.Supp. 406, 414 n. 19 (D.Minn.1994) (following *Goldberg* despite enactment of Judicial Improvements Act of 1990, 28 U.S.C. § 1367, which at least arguably undermines *Zahn*).

the law of Louisiana the class representatives were entitled to fees. Their rights of recovery were not created by a judge's summing the discrete rights of class members. The district court applied the law of Louisiana. Because it did so, we are persuaded that the individual claims of the class representatives met the requisite jurisdictional amount. We turn now to the question of supplemental jurisdiction over the class members, confronting at its threshold *Zahn*'s current vitality. That is the question of *Zahn*.

B. SUPPLEMENTAL JURISDICTION: THE UNNAMED PLAINTIFFS' CLAIMS

Supplemental jurisdiction over the unnamed plaintiffs' claims has been an open question since Congress passed the Judicial Improvements Act of 1990.[4]

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4. 28 U.S.C. § 1367 provides in relevant part as follows:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332

(Cont'd)

Congress enacted § 1367 against the background of *Zahn*, in which the Supreme Court had held that the claim of each member of a class action must meet the amount-in-controversy requirement. *Zahn*, 414 U.S. at 301, 94 S.Ct. at 511-12. *Zahn* forbade the exercise of supplemental

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> of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

jurisdiction over the claims of class members who did not do so.

Defendants argue that Congress changed the jurisdictional landscape in 1990 by enacting § 1367. Section 1367(a) grants district courts supplemental jurisdiction over related claims generally, and § 1367(b) carves exceptions. Significantly, class actions are not among the exceptions.

Some commentators have interpreted this silence to mean that Congress overruled *Zahn* and granted supplemental jurisdiction over the claims of class members who individually do not demand the necessary amount in controversy.[5] Some of § 1367's drafters disagree.[6] No appellate court has ruled on the question yet.[7] The district

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5. *See, e.g.,* 1 James W. Moore et al., *Moore's Federal Practice,* ¶ 0.97[5], at 928 (2d ed. 1994); 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions,* § 6.11, at 6-48 (3d ed. 1992); Joan Steinman, *Section 1367 — Another Party Heard From,* 41 Emory L.J. 85, 103 (1992); Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute,* 40 Emory L.J. 963, 981 (1991).

6. *See* Thomas D. Rowe, Jr., Stephen B. Burbank, & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer,* 40 Emory L.J. 943, 960 n. 90 (1991). Professors Rowe, Burbank, and Mengler all had a hand in crafting the supplemental jurisdiction statute. *See* Rowe et al., *supra,* 40 Emory L.J. at 949 n. 27; H.R.Rep. No. 734, 101st Cong., 2d Sess. 27, *reprinted in* 1990 U.S.C.C.A.N. 6860, 6873 n. 13.

7. This circuit has twice broached the question, but never answered it. In *More v. Intelcom Support Servs., Inc.,* we noted that
(Cont'd)

courts are split even within this circuit, although the majority appear to hold that *Zahn* survives the enactment of § 1367.[8]

(Cont'd)
§ 1367 might affect the *Zahn* rule, but declined to decide that because the action at issue had been filed before § 1367 took effect. *See* 960 F.2d 466, 473 (5th Cir.1992). Later, in *Watson v. Shell Oil Co.,* we reasoned that the *Zahn* rule would demand dismissal of class members' claims below the jurisdictional threshold. *See* 979 F.2d 1014, 1021 (5th Cir.1992). However, that case had been filed before § 1367 took effect, and the opinion makes no mention of that statute. *See id.* at 1021 & n. 27. In any event, *Watson* has been vacated. When this court ordered the case reheard en banc, *see* 990 F.2d 805 (5th Cir.1993), the panel opinion in *Watson* was vacated, *see* 5th Cir.R. 35 (Internal Operating Procedure), and the en banc rehearing never occurred because the parties settled and the appeal was dismissed.

The Third Circuit is the only other circuit to have considered the question. In *Packard v. Provident Nat'l Bank,* the court noted the conflict among authorities on our question, but declined to resolve it. *See* 994 F.2d 1039, 1045-46 n. 9 (3d Cir.), *cert. denied,* __ U.S. __, 114 S.Ct. 440, 126 L.Ed.2d 373 (1993).

8. *Compare Henkel v. ITT Bowest Corp.,* 872 F.Supp. 872, 877 (D.Kan.1994) (holding that § 1367 did not overrule *Zahn*); *Aspe Arquitectos, S.A. de C.V. v. Jamieson,* 869 F.Supp. 593, 595 (N.D.Ill.1994) (same); *Dirosa v. Grass,* No. 94-2551, 1994 WL 583276, at *2, 1994 U.S.Dist. LEXIS 15100, at *7 (E.D.La. Oct. 19, 1994) (same); *Kaplan v. Mentor Corp.,* No. 94-6249, 1994 U.S.Dist. LEXIS 15779, at *3 (N.D.Ill. Oct. 17, 1994) (same), *supplemented,* 1994 U.S.Dist. LEXIS 15410 (E.D.Ill. Oct. 24, 1994); *Benninghoff v. Tolson,* No. 94-2903, 1994 WL 519745, at *4, 1994 U.S.Dist. LEXIS 13428, at *11 (E.D.Pa. Sept. 22, 1994) (same); *Clement v. Occidental Chem. Corp.,* Nos. 94-1315, 94-1316, 94-
(Cont'd)

Perhaps, by some measure transcending its language, Congress did not intend the Judicial Improvements Act to overrule *Zahn*. The House Committee on the Judiciary considered the bill that became § 1367 to be a "noncontroversial" collection of "relatively modest proposals," not the sort of legislative action that would upset any long-established precedent like *Zahn*. 1990 U.S.C.C.A.N. at 6860, 6861. Plaintiffs argue that the Act was prompted not by a congressional desire for wholesale revisions of the jurisdictional rules, but by the more limited desire to restore traditional understandings of federal jurisdiction, which were upset by *Finley v. United States*, 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989). In *Finley*, the Supreme Court held that federal courts could not exercise pendent-party jurisdiction without an express legislative grant, a grant never thought necessary before. *Id.*

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1317, 1994 WL 479155, at *4, 1994 U.S.Dist. LEXIS 12387, at *19 (E.D.La. Aug. 30, 1994) (same); *Potash*, 866 F.Supp. at 414 (same); *North Am. Mechanical Servs. Corp. v. Hubert*, 859 F.Supp. 1186, 1188-89 (C.D.Ill.1994) (same); *Duet v. Lawes*, No. 94-0739, 1994 WL 151095, at * 2, 1994 U.S.Dist. LEXIS 4755, at *4-5 (E.D.La. Apr. 7, 1994) (same); *Riverside Transp., Inc. v. Bellsouth Telecommunications, Inc.*, 847 F.Supp. 453, 456 (M.D.La.1994) (same); *Fink v. Heath*, No. 91-2982, 1991 WL 127664, at *3, 1991 U.S.Dist. LEXIS 9182, at *7-8 (N.D.Ill. July 8, 1991) (same); *and Griffin v. Dana Point Condominium Ass'n*, 768 F.Supp. 1299, 1302 (N.D.Ill.1991) (same) *with Lindsay v. Kvortek*, 865 F.Supp. 264, 276 (W.D.Pa.1994) (determining that § 1367 supersedes *Zahn*; case did not involve class action); *Patterson Enters., Inc. v. Bridgestone/ Firestone, Inc.*, 812 F.Supp. 1152, 1154 (D.Kan.1993) (same); *and Garza v. National Am. Ins. Co.*, 807 F.Supp. 1256, 1258 & n. 6 (M.D.La.1992) (same).

at 556, 109 S.Ct. at 2010-11. In short, Congress intended the Act to "essentially restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction," not, arguably, to alter *Zahn*. 1990 U.S.C.C.A.N. at 6860, 6874. A disclaimer in the legislative history strives to make this point clear by stating: "[T]he section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." 1990 U.S.C.C.A.N. at 6860, 6875. The passage cites *Zahn* as a pre-*Finley* case untouched by the Act. 1990 U.S.C.C.A.N. at 6860, 6875 n. 17; *see also* Rowe et al., *supra*, 40 Emory L.J. at 960 n. 90 (stating that this passage was intended to demonstrate that *Zahn* was to survive the enactment of § 1367).

We cannot search legislative history for congressional intent unless we find the statute unclear or ambiguous. Here, it is neither. The statute's first section vests federal courts with the power to hear supplemental claims generally, subject to limited exceptions set forth in the statute's second section. Class actions are not among the enumerated exceptions.

Omitting the class action from the exception may have been a clerical error.[9] But the statute is the sole repository of

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9. The impressive array of Professors Burbank, Mengler, and Rowe has observed that "[i]t would have been better had the statute dealt explicitly with this problem, and the legislative history was an attempt to correct the oversight." Rowe et al., *supra*, 40 Emory L.J. at 960 n. 90. They have noted that the supplemental jurisdiction statute is "not a perfect effort." Thomas D. Rowe, Jr., et al., *A Coda on Supplemental Jurisdiction*, 40 Emory L.J. 993, 993 (1991).
(Cont'd)

congressional intent where the statute is clear and does not demand an absurd result. *See West Virginia Univ. Hosps., Inc. v. Casey,* 499 U.S. 83, 99-100, 111 S.Ct. 1138, 1147, 113 L.Ed.2d 68 (1991) (refusing to permit the Court's "perception of the 'policy' of the statute to overcome its 'plain language' "); *United States v. X-Citement Video, Inc.*, __ U.S. __, __-__, 115 S.Ct. 464, 467-68, 130 L.Ed.2d 372 (1994) (rejecting lower court's "plain language reading" of a statute where that reading would create a "positively absurd" result). Abolishing the strictures of *Zahn* is not an absurd result. Justice Brennan's dissent joined by Justices Douglas and Marshall states the counterposition. Some respected commentators would welcome *Zahn*'s demise. *See, e.g.*, 1 Moore et al., *supra*, § 0.97[5], at 928; Arthur & Freer, *supra,* 40 Emory L.J. at 1008 n. 6 ("Abrogating *Zahn* would hardly be absurd" since doing so would harmonize case law

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Some disagree and with inexplicably sharp language, given the reality that most mistakes become "clear" once they are identified. *See, e.g.*, 1 Moore et al., *supra,* § 0.97[5], at 928 (blaming "Congressional sloth in drafting the supplemental jurisdiction statute" for confusion over whether *Zahn* survives § 1367); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute,* 40 Emory L.J. 445, 471 (1992) (noting that Congress passed § 1367 too quickly to notice some of its problems); Karen N. Moore, *The Supplemental Jurisdiction Statute: An Important But Controversial Supplement to Federal Jurisdiction,* 41 Emory L.J. 31, 56-58 (1992) (chastising Congress and its legislative advisors for enacting an ambiguous statute); Thomas C. Arthur & Richard D. Freer, *Close Enough For Government Work: What Happens When Congress Doesn't Do Its Job,* 40 Emory L.J. 1007, 1007 (1991) (calling § 1367(b) a "nightmare of draftsmanship").

and "enable federal courts to resolve complex interstate disputes in mass tort situations."). But the wisdom of the statute is not our affair beyond determining that overturning *Zahn* is not absurd. We are persuaded that under § 1367 a district court can exercise supplemental jurisdiction over members of a class, although they did not meet the amount-in-controversy requirement, as did the class representatives.

IV. ABSTENTION AND DISCRETIONARY EXERCISE OF SUPPLEMENTAL JURISDICTION

Colorado River abstention is to be used only sparingly, *see Colorado River,* 424 U.S. at 813, 96 S.Ct. at 1244, and this case is a poor candidate. The district court acknowledged that "several of the [*Colorado River*] factors are either neutral or weighing in favor of the exercise of [federal] jurisdiction." It rested its decision on two concerns: that remanding only the class members' claims would split the action, and the novel and complex questions of state law.

The first of these two concerns — the risk of piecemeal litigation — is a problem only under the district court's view of abstention. The second consideration — that novel and complex state law issues govern the action — has more merit. *Cf. Moses Cone,* 460 U.S. at 23-24, 103 S.Ct. at 941 (disfavoring abstention where federal question controls). These state law issues included whether indirect purchasers can state a claim under Louisiana antitrust law, and whether the claims in this case were preempted by federal antitrust law.

We agree that these may prove to be difficult questions. Standing alone, however, the novelty or complexity of state law issues is not enough to compel abstention. *See, e.g., Rougon v. Chevron, U.S.A., Inc.*, 575 F.Supp. 95, 97 (M.D.La.1983) (denying motion to remand to state court even though "the issues presented, involving previously undecided matters of Louisiana . . . law, are peculiarly suited to disposition by the state courts of Louisiana"). Only " 'exceptional' circumstances, the 'clearest of justifications,' . . . can suffice under *Colorado River* to justify the surrender of [federal] jurisdiction." *Moses Cone*, 460 U.S. at 25-26, 103 S.Ct. at 942 (emphasis omitted). This is not one of those truly rare and exceptional cases in which *Colorado River* abstention is proper.

The district court remanded the claims of other class members because they presented "novel issues of state law," including whether indirect purchasers could state a claim under Louisiana antitrust law and whether the antitrust claim was preempted by federal law.

Refusing to exercise supplemental jurisdiction over the unnamed plaintiffs' claims reflects respect for considerations of comity, but it assumes that the claims of the class representatives were to be remanded to state court. The court must now adjudicate claims of the class representatives — including the same novel and complex state law issues the district court preferred to leave to Louisiana. So the interests of comity will not be served by declining to exercise supplemental jurisdiction over the class members whose claims do not meet the jurisdictional amount.

In short, the entire case should remain in federal court. The district court had diversity jurisdiction over the named plaintiffs' claims; § 1367 granted it supplemental jurisdiction over the claims of the unnamed plaintiffs; and, considering that it must try the named plaintiffs' claims, it abused its discretion on the facts here in declining supplemental jurisdiction over the unnamed plaintiffs' claims. It is not necessary to decide the problematic contention that the district court also had federal question jurisdiction, and we do not. We VACATE the district court's remand order, and REMAND to the district court for further proceedings. The petition for mandamus is DENIED.

APPENDIX K — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED AND FILED JUNE 21, 1994

ROBIN FREE and RENEE FREE v. ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB COMPANY, MEAD JOHNSON & COMPANY

CIVIL ACTION NO. 93-971

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

1994 U.S. Dist. LEXIS 11231

June 21, 1994, Decided

June 21, 1994, Filed, Entered, Docketed

* * *

JUDGES: PARKER

OPINION BY: JOHN V. PARKER

OPINION: RULING ON MOTION FOR RECONSIDERATION

This matter is before the court on a motion by defendants to reconsider the prior ruling which remanded this action to state court. An opposition has been filed. There is no need for oral argument. Removal jurisdiction is allegedly based upon *28 USC §§ 1441,* 1446, 1331 and 1332.

Appendix K

On October 14, 1993, the plaintiffs filed this action in the Eighteenth Judicial District, Parish of West Baton Rouge, Louisiana, seeking damages for economic loss including treble damages, attorney fees, and legal interest. The plaintiffs purport to file this lawsuit on behalf of themselves and a class of consumers of infant formula who reside in the state of Louisiana and at any time during the period of January 1, 1980, through December 31, 1992, purchased one or more of the defendants' brand of infant formula in the State of Louisiana. The class has not been certified. The petition seeks to limit damages to a total not to exceed $20,000 per class member. The state court petition specifically alleges an unreasonable restraint of trade in violation of state law only: La.R.S. 51:122 et.seq., La.R.S. 2315 and La.R.S.1953.[1] No reference is made to federal law. The defendants in this action are Abbott Laboratories, Inc., Bristol-Myers Squibb, and Mead Johnson & Company.

On November 26, 1993, the defendants filed a notice of removal pursuant to *28 USC §§ 1441,* 1446, 1331 and 1332. Thereafter, on November 30, 1993, the plaintiffs filed a motion to remand the case to state court and on May 5, 1994,

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1. As the defendants point out, in paragraph 14 of the petition the plaintiffs allege "an understanding and concert of action among defendants, the substantial terms of which were to raise, fix, maintain and stabilize at artificially high levels the wholesale prices of infant formula sold in the United States, including the state of Louisiana." In the previous ruling, the court held that this allegation does not necessarily allege a violation of federal antitrust law exclusively. Thus, if plaintiffs have claims under both federal law and state law, they may elect to assert their claims under state law only.

the court remanded this matter to the Eighteenth Judicial District. The defendants now urge the court to reconsider its ruling.

In support of their motion, the defendants assert that this court has jurisdiction to reconsider the ruling on plaintiffs' motion to remand because a ruling to remand which is not predicated on lack of subject matter jurisdiction or a defect in the removal process is subject to review.

The court may reconsider the ruling to remand on the basis of *28 U.S.C. § 1367*(c). *In re Surinam Airways Holding Co., 974 F.2d 1255 (11th Cir.1992)* (A remand order issued pursuant to *28 U.S.C. § 1367*(c) is not premised on 1447(c) because it is a discretionary decision declining the exercise of expressly acknowledged jurisdiction. Thus, since the removal is not premised on either a defect in removal procedure or a lack of jurisdiction, it is reviewable.) *Burks v. Amerada Hess Corp., 8 F.3d 301 (5th Cir. 1993)* (A remand order which is based on the court's discretion not to exercise its jurisdiction is reviewable.) The court reconsiders and refuses to grant the relief requested.

The court supplements its reasons for the remand of the entire case. In its previous ruling filed April 5, 1994, the court ruled that the case did not present a federal question. However, it found that diversity jurisdiction did exist because the parties met the citizenship requirements and the named plaintiffs met the jurisdictional amount requirement. Under Louisiana law the attorney's fees allowed by statute are attributed to the class representatives; therefore, the claims

of the named plaintiffs exceed $50,000.[2] The court further held that it had supplemental jurisdiction over claims of the remaining class members because the claims are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. *28 U.S.C. § 1367, Garza v. National American Ins. Co., 807 F. Supp. 1256* (M.D. La. 1992.).

The court declined to exercise supplemental jurisdiction under *28 U.S.C. § 1367* in the interest of comity on the grounds that the action raised novel issues of state law, such as whether indirect purchasers have a cause of action under the Louisiana antitrust law, La. R.S. 51:121, 122 and whether the plaintiffs' claims involve an area of state interest which is covered by Louisiana antitrust law and not preempted by federal law. Thus, the court remanded all claims to state court.

Having determined that it would not exercise supplemental jurisdiction over the non-named plaintiffs, the court then declined to exercise jurisdiction over claims of the named plaintiffs over which it had jurisdiction pursuant to *28 U.S.C. § 1332*. Although not clearly articulated, the basis of the court's ruling was the Colorado River/Moses H.

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2. La. Code Civ. Pro. art. 595 provides in pertinent part: [T]he court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is made which is beneficial to the class.

Cone doctrine of abstention.[3] By this ruling, that point is clarified:

"With the balance heavily weighted in favor of the exercise of jurisdiction, the court must carefully consider the following when deciding whether to invoke the doctrine of abstention: the assumption by either court over property; the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; the order in which jurisdiction was obtained; whether state or federal law provides the rule of decision; and whether the state court proceeding would adequately protect the rights of the party invoking federal jurisdiction." *Colorado River, supra; Moses H. Cone, supra.*

The court has considered each factor and recognizes that several of the factors are either neutral or weighing in favor of the exercise of jurisdiction. However, the court finds that the avoidance of piecemeal litigation and the fact that state law provides the rule of decision in this action is critical because of the novel and complex issues of state law presented. These include whether indirect purchasers have a cause of action under the Louisiana antitrust law, La. R.S. 51:121, 122 and whether the plaintiffs' claims involve an area of state interest which is covered by Louisiana antitrust law and not preempted by federal law.

The argument of the defendants that prior rulings of this court dictate that the court not abstain is not persuasive.

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3. *Colorado River Water Conservation District v. U.S., 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976), Moses H. Cone Memorial Hospital v. Mercury Const. Corp., 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).*

Unlike *Rougon v. Chevron, U.S.A. Inc., 575 F. Supp. 95 (M.D. La. 1983),* the present case involves a class action with the potential for inconsistent rulings for parties who could have been members of the same class. Also, contrary to *Atlantic Mutual v. IT Corp., 842 F. Supp. 910 (M.D. La. 1994),* this action involves novel and complex issues of state law.

Accordingly, the motion by defendants for reconsideration is hereby DENIED.

Baton Rouge, Louisiana, June 21, 1994.

JOHN V. PARKER, CHIEF JUDGE

MIDDLE DISTRICT OF LOUISIANA

APPENDIX L — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA DATED, DECIDED AND FILED APRIL 5, 1994

ROBIN FREE AND RENEE FREE v. ABBOTT LABORATORIES, INC., BRISTOL-MEYERS SQUIBB COMPANY, INC., AND MEAD JOHNSON & COMPANY

CIVIL ACTION NO. 93-971-A

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

1994 U.S. Dist. LEXIS 4563

April 5, 1994, Decided

April 5, 1994, Filed

* * *

JUDGES: PARKER

OPINION BY: JOHN V. PARKER

OPINION: RULING ON MOTION TO REMAND

This matter is before the court on a motion by plaintiffs, Robin Free and Renee Free, to remand. An opposition has been filed. Oral argument was held and the matter taken under advisement. Removal jurisdiction is allegedly based upon *28 USC §§ 1441,* 1446, 1331 and 1332.

Appendix L

On October 14, 1993, plaintiff's[1] filed this action in the Eighteenth Judicial District, Parish of West Baton Rouge, State of Louisiana, seeking damages for economic loss including treble damages, attorney fees, and legal interest from the date of judicial demand, but in a total not to exceed $ 20,000 per class member resulting from defendants engaging in an unreasonable restraint of trade in violation of La. R.S. 51:122 et. seq., La. R.S. 2315 and La. R.S. 1953.[2] Made defendants in this action are Abbott Laboratories, Inc. (a foreign corporation with its principal place of business in Abbott Park, Illinois), Bristol-Myers Squibb (a foreign corporation with its principal place of business in New York, New York), and Mead Johnson & Company (a foreign corporation with its principal place of business in Evansville, Indiana).[3]

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1. The plaintiffs purport to file this lawsuit on behalf of consumers of infant formula who reside in the state of Louisiana and at any time during the period of January 1, 1980 through December 31, 1992 purchased one or more of the defendants' brand of infant formula in the State of Louisiana. The class has not been certified.

2. As the defendants point out, in paragraph 14 of the petition the plaintiffs allege "an understanding and concert of action among defendants, the substantial terms of which were to raise, fix, maintain and stabilize at artificially high levels the wholesale prices of infant formula sold in the United States, including the state of Louisiana."

3. Although the plaintiffs allege that the Abbott Laboratories, Bristol-Myers Squibb Company, and Mead Johnson and Company are "foreign" corporations neither specifically refer to the state of incorporation of the three entities.

On November 26, 1993, the defendants filed a notice of removal pursuant to *28 USC §§ 1441,* 1446, 1331 and 1332. Thereafter, on November 30, 1993, plaintiffs filed a motion to remand the case to state court.

Federal Question Jurisdiction

In support of their motion, the plaintiffs argue that they have elected to proceed pursuant to state law and that removability depends upon the allegations of the pleadings actually filed by the plaintiff and not by what could have been alleged.[4] In addition, the plaintiffs claim that questions concerning the propriety of plaintiffs' Louisiana antitrust claims must be left for the state court to decide on a motion to dismiss. Finally, the plaintiffs argue that the limitation which courts have placed on a plaintiff's right to control a case, known as the "artful pleading" doctrine, is inapplicable because their cause of action is not necessarily federal.

In opposition, the defendants assert that the court does have authority to determine whether plaintiffs' claims are cognizable under Louisiana antitrust law and that plaintiffs' assertion of interstate price-fixing does not state a claim under the Louisiana antitrust statute because it is limited to intrastate conspiracies. La. R.S. 51:121,122.[5] The defendants

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4. The plaintiffs claim that the defendants are attempting to recast their case under the Sherman Act because indirect purchasers such as the class members in the present action would not have a claim thereunder. *Illinois Brick Co. v. Illinois, 431 US. 720, 97 S.Ct 2061, 52 L. Ed. 2d 707 (1977).*

5. The defendants claim that of the cases cited by the plaintiffs only one *HMC Management Corp. v. New Orleans Basketball Club,*
(Cont'd)

also claim that where plaintiffs seek to circumvent a bar to asserting their claims under federal law by "artfully pleading" them as state claims, removal is appropriate once the court has determined that a federal claim is necessarily presented. The defendants argue that the "artful pleading" doctrine applies whether there is a federal preemption issue or not.

It is well established that "the party who brings a suit is master to decide what law he will rely upon . . . and if he can maintain his claim on both state and federal grounds, he may ignore the federal question and assert only a state law claim and defeat removal." *Redwood Theatres v. Festival Enterprises, 908 F.2d 477 (9th Cir. 1990)* citing *The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 33 S. Ct. 410, 57 L. Ed. 716 (1913)* and *Sullivan v. First Affiliated Securities, Inc., 813 F.2d 1368* (9th Cir.) cert. denied, *484 U.S. 850, 108 S.Ct 150, 98 L. Ed. 2d 106 (1987).*

In the present action, the plaintiffs have chosen to assert their claims under Louisiana antitrust law. Unless the plaintiff's claim is exclusively governed by federal law, so that the plaintiff necessarily is stating a federal cause of action whether he chooses to articulate it that way or not, the federal court will not ignore the plaintiff's choice of state law as the basis of his action. Wright and Miller, Federal Practice and Procedure § 3722.

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375 So.2d 700, (La. App. 4th Cir. 1974) writ denied, *378 So.2d 1384* and *379 So.2d 11 (La. 1980)* actually deals with the Louisiana anti-trust statute and it is actually contrary to plaintiffs position.

The court finds that the plaintiffs' petition alleging a conspiracy to "raise, fix, maintain and stabilize at artificially high levels the wholesale prices of infant formula sold in the United States, including Louisiana," does not necessarily state only a federal cause of action. It is clear that the Congress intended the federal antitrust law to supplement, not displace, state antitrust remedies. *California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989).* (The Congressional purposes upon which Illinois Brick, Id. were based provided no support for a finding that state antitrust laws permitting claims of indirect purchasers who alleged a nationwide conspiracy to fix cement prices are preempted by federal law.) The fact that the conspiracy affects interstate commerce is not a ground for preemption.

The court finds that the cases cited by the defendant holding that state antitrust regulation are inapplicable to professional basketball (HMC v. New Orleans Basketball Club, Id.) and college football (*English v. National Collegiate Football Association, 439 So.2d 1218 (La. App. 4th Cir. 1983))* are distinguishable from the present case, because interstate sports is an area which demands uniformity (like the transportation cases including *Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959)).* See also *Flood v. Kuhn, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972)* holding that state antitrust regulations are not applicable to professional baseball. Otherwise, the challenged state legislation in each case would impede interstate commerce by having a significant impact on the whole league fabric, not just on the state's one or two teams. *Valley Bank of Nevada v. Plus System, Inc., 914 F.2d 1186 (9th Cir. 1990).* In addition, the court noted that state

courts are fully capable of handling commerce-clause challenges to antitrust laws. Redwood, Id. See also *Cheshire v. Coca Cola Bottling Affiliated, Inc., 758 F. Supp. 1098 (D. S.C. 1990)* which directly addresses this issue.

Accordingly, the court finds that the plaintiffs' claims do not arise under federal law and that the district court lacks federal question jurisdiction to entertain removal of the action from state court.

Diversity Jurisdiction

The plaintiffs concede that this litigation involves citizens of different states, but argue that the matter in controversy does not exceed $ 50,000, because the plaintiffs have limited the recovery to each class member to an amount not to exceed $ 20,000.[6] The plaintiffs argue that the class members may not aggregate their claims to meet the required jurisdictional amount. The plaintiffs also assert that the attorney fees should not be aggregated and ascribed to each class member.

In opposition, the defendants claim that the named plaintiffs have claims well in excess of $ 50,000, due to their claim for attorney fees and that the court has supplemental federal jurisdiction over the remaining putative class

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6. The plaintiffs claim that the $ 20,000 figure was achieved by assuming the purchase of baby formula for a two year period, less what the formula should have cost, trebling the damages and allowing for an additional sum as attorney fees. See page 17 of plaintiffs memo for more figures.

members. Alternatively, the defendants claim that the plaintiffs' claims for attorney fees can be aggregated to satisfy the jurisdictional amount.

The court finds that the named plaintiffs class have claims in excess of $ 50,000 because under Louisiana law the attorney's fees allowed by statute are attributed to the class representatives.[7] Under *28 U.S. C. § 1367,* federal courts have supplemental jurisdiction over claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Under *28 U.S.C. 1367*(c), a federal district court may decline to exercise this supplemental jurisdiction if the claim raises novel or complex issues of state law, the state law claim substantially predominates over the claim or claims over which the court had original jurisdiction, the court has dismissed claims over which it had original jurisdiction, or if there are other compelling reasons for declining jurisdiction. Wright and Miller, Federal Practice and Procedure § 3523, *Tigard Elec., Inc. v. National Electrical Contractors Assn., 790 F. Supp. 1498 (D. Or. 1992).* The court finds that the plaintiffs' claims present novel issues of state law such as whether indirect purchasers have a cause of action under the Louisiana antitrust law, La. R.S. 51:121,122 and whether the plaintiffs' claim involves an area of state interest which is covered by Louisiana antitrust law and not preempted by federal law.

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7. La. Code Civ. Pro. art. 595 provides in pertinent part: The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is made which is beneficial to the class.

Therefore, in the interest of comity, the court declines to exercise supplemental jurisdiction over the putative class members. *Fiscus v. City of Roswell, 832 F. Supp. 1558 (N.D. Ga. 1993).* (Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring them a surer-footed reading of applicable law.)

Accordingly, the motion to remand by plaintiffs is hereby GRANTED and this action will be remanded to the Eighteenth Judicial District for the Parish of West Baton Rouge, Louisiana.

Baton Rouge, Louisiana, April 5, 1994.

JOHN V. PARKER, CHIEF JUDGE

MIDDLE DISTRICT OF LOUISIANA

APPENDIX M — RELEVANT STATUTES

28 U.S.C. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different states and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

* * *

Appendix M

28 U.S.C. § 1441

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

Appendix M

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

* * * *

Supreme Court, U.S.
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No. 99-391

IN THE
SUPREME COURT OF THE UNITED STATES

ROBIN FREE and RENEE FREE,

Petitioners,

v.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB COMPANY and MEAD JOHNSON & COMPANY

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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October 15, 1999

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Where original federal jurisdiction exists, pursuant to 28 U.S.C. § 1332, over the representative plaintiffs in a class action, may the federal courts exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, over other putative class members whose claims form part of the same case or controversy as the claims of the representative plaintiffs but would otherwise not fall within 28 U.S.C. § 1332?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

This is to certify that Respondents Abbott Laboratories and Bristol-Myers Squibb Company have no corporate parents and that no publicly traded company owns 10% or more of their stock. Respondent Mead Johnson & Company is a wholly owned subsidiary of Bristol-Myers Squibb Company.

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IN THE
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ROBIN FREE and RENEE FREE,
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v.
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Abbott Laboratories, Bristol-Myers Squibb Company and Mead Johnson & Company submit this brief in opposition to the Petition for a Writ of Certiorari in the above-captioned case.

INTRODUCTION

Petitioners Robin Free and Renee Free portray the Fifth Circuit's decision in *In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995) ("*Abbott*"), as a major assault on federalism and a dramatic expansion of federal jurisdiction. In fact, it is nothing of the kind. The *Abbott* decision is solidly grounded in the plain and unambiguous language of 28 U.S.C. § 1367. Not only was it correctly decided, but it also will have only the most marginal of impacts on the federal courts. Petitioners can identify—and Respondents have found—just a single case, *Abbott* itself, that has applied the Fifth Circuit's analysis to find federal jurisdiction over a class action where such jurisdiction otherwise would not have existed. *Abbott* clearly does not raise the kind of issue of transcendent national importance that

would justify granting the current petition for a writ of certiorari. That point is underscored by the fact that Petitioners did not discover their purported concern for federalism until four years after the decision they now bring before this Court. Both in the Fifth Circuit and here, Petitioners have practiced a strategy of selectively appealing some issues while saving others for later appeal. That strategy constitutes a far greater threat to federal judicial resources than anything in the Fifth Circuit's *Abbott* decision.

Abbott's limited nature is not surprising. Indeed, it is inherent in the nature of class actions, since most certified classes are relatively homogenous both in terms of class members' underlying claims and their alleged harm. If the representative plaintiffs have suffered small alleged damages, so generally have other class members; if the representative plaintiffs' alleged damages are large, so too are those of the rest of the class. It is only in the highly unusual circumstance—often, as in *Abbott* itself, having nothing to do with the damages alleged—that the class becomes "lumpy", with some members having larger claims and others having smaller ones.

Abbott, for example, was but one of 21 indirect purchaser antitrust class actions that the same group of lawyers who represent Petitioners brought in 18 different states alleging the same price fixing conspiracy by the same three Respondent manufacturers of infant formula. Of those 21 class actions, Respondents sought to remove nine to federal court. All of the removed cases, with the sole exception of *Abbott*, were remanded to the states where they originated. All 20 class actions besides *Abbott* were prosecuted in state court. There could not be a better demonstration of the singularity of the *Abbott* result.

In *Abbott*, the class became "lumpy" because of an unusual Louisiana statute that expressly awards all attorney's fees in a class action to the representative plaintiffs. La. Code Civ. Pro.

Art. 595 ("Art. 595"). The operation of Art. 595—which exists in none of the other states where Petitioners' counsel brought related indirect purchaser infant formula suits (nor in any other state that Respondents have found)—made the Louisiana representative plaintiffs' potential recovery substantially larger than that of any other class members. And that "lumpiness" derived not from differences in alleged damages, but purely from the different way that the Louisiana statute affected the representative plaintiffs.

Although Petitioners assert that the *Abbott* result "significantly shifts to federal courts state-law claims that do not satisfy the jurisdictional minimum" (Petition for a Writ of Certiorari ("Cert. Pet.") at 18) and "significantly taxes federal court resources" (*id.* at 19), the history of the litigation of which *Abbott* is a part proves just the opposite. *Abbott* is a singular result. It is, therefore, not a case that justifies this Court's review.

COUNTERSTATEMENT OF THE CASE

This petition is the last vestige of a series of lawsuits that began in early 1991 and alleged that Respondents (and others) had conspired to fix the price of infant formula sold in the United States. The first group of suits included: (a) more than 20 class actions filed in federal district courts around the country (some by the same counsel that represent Petitioners here) on behalf of direct purchasers of infant formula (primarily retailers and wholesalers); (b) an action filed in federal district court in Florida by individual retailers; and (c) an action filed in federal district court in Florida by the Florida attorney general. All those cases alleged violations of the Sherman Act. They were consolidated for pretrial purposes in the United States District Court for the Northern District of Florida under the caption *In re Infant Formula Antitrust Litig.*, MDL 878, and were settled in mid-1992. A state court suit by indirect purchasers (consumers) alleging violations of the California antitrust statute was settled in early 1993.

After those settlements, one group of lawyers who had represented some of the plaintiffs in the direct purchaser cases recruited Nestle Food Company, a competitor of Respondents, to file suit in the United States District Court for the Central District of California. That case went to trial in mid-1995 and, after five weeks, the jury returned a defense verdict, finding that the conspiracy alleged by the plaintiff—the same conspiracy that formed the basis for all the lawsuits—did not exist. In January 1997, the United States Court of Appeals for the Ninth Circuit affirmed that verdict.

Another group of lawyers from the direct purchaser cases—who are now Petitioners' counsel in this case—chose a different path but also ended up on the losing end of a jury verdict. Those lawyers sued Respondents in 18 states alleging, on behalf of purported statewide classes of indirect purchasers, that the same antitrust conspiracy alleged in the direct purchaser cases violated state antitrust and consumer protection statutes. In the fall of 1995, the first and only of those indirect purchaser lawsuits was tried to a jury in Wichita, Kansas, and, after a nine week trial, the jury returned a verdict of no conspiracy.

Of the other state indirect purchaser cases, defense motions to dismiss the complaint were granted in whole or in part in ten of them and four of seven plaintiffs' motions to certify a class were denied. By mid-1997, the parties had agreed to settle all the suits—including this one—that were still pending in trial courts or on appeal.

Petitioners' counsel filed the current lawsuit in Louisiana state court on October 14, 1993. Respondents removed the case to the United States District Court for the Middle District of Louisiana on November 26, 1993, and, on April 5, 1994, the district court remanded it to state court. In ordering remand, the district court ruled that federal jurisdiction existed over the representative plaintiffs pursuant to 28 U.S.C. § 1332 and over the absent class members pursuant to 28 U.S.C. § 1367.

Nonetheless, the court declined, pursuant to 28 U.S.C. § 1367(c), to exercise supplemental jurisdiction over the absent class members and abstained from exercising diversity jurisdiction over the representative plaintiffs.

Respondents sought review of the district court's remand order in the United States Court of Appeals for the Fifth Circuit both by direct appeal and by petition for a writ of mandamus. On April 24, 1995, the Fifth Circuit reversed, holding that federal jurisdiction existed, pursuant to 28 U.S.C. § 1332, over the representative plaintiffs and, pursuant to 28 U.S.C. § 1367, over the absent class members, that it was error for the district court to abstain from exercising diversity jurisdiction over the representative plaintiffs, and that it was an abuse of discretion to decline supplemental jurisdiction over the absent class members. On September 1, 1995, the Fifth Circuit denied rehearing and rehearing *en banc*.

At that time, if Petitioners truly believed that the Fifth Circuit's ruling was an assault on federalism and an affront to federal jurisdiction, they could have sought review in this Court by petition for writ of certiorari. It would have been particularly appropriate at that time to do so since it was important for Petitioners to know the proper court in which their Louisiana claims were to be litigated. That is because the Louisiana case was then one of more than 20 related indirect purchaser lawsuits that were currently pending and were, in all likelihood, either going to be tried *seriatim* or settled together.

Instead, Petitioners elected to return to the United States District Court for the Middle District of Louisiana and litigate their claims there. It was four years later—(1) after that court had refused final approval of the settlement of the Louisiana case, (2) after it had granted Respondents' motion to dismiss for failure to state a claim, (3) after Petitioners had appealed to the Fifth Circuit a second time, unsuccessfully re-raising jurisdictional arguments already rejected by the earlier appellate panel, (4) after the Fifth Circuit had certified state

antitrust issues to the Louisiana Supreme Court, (5) after the Louisiana Supreme Court had refused to accept that certification, (6) after the Fifth Circuit had then affirmed the district court's dismissal of the case, and (7) after all other related lawsuits had long since been either won by Respondents or settled by the parties—that Petitioners sought, as a way to resurrect the Louisiana action, review of the ruling on remand that the Fifth Circuit had made back in 1995.

REASONS FOR DENYING THE WRIT

I. THE *ABBOTT* DECISION HAS ONLY THE MOST MARGINAL IMPACT ON FEDERAL JURISDICTION AND, THEREFORE, DOES NOT CREATE AN ISSUE OF NATIONAL IMPORTANCE.

There is only one case—*Abbott* itself—in which a court has applied the *Abbott* ruling to find federal jurisdiction over a class action where such jurisdiction would not otherwise have existed. Although Petitioners assert that some federal courts have "followed" the *Abbott* result and others have "expressly rejected" it (Cert. Pet. at 8), the fact is that in none of the cases cited by Respondents has the *Abbott* decision been the reason a federal court has asserted federal jurisdiction over a class whose claims, in the absence of *Abbott*, would not have fallen within 28 U.S.C. § 1332. Indeed, Petitioners cannot point to even one of the 20 other indirect purchaser infant formula antitrust class actions that their counsel brought in state courts around the country where federal jurisdiction was held to exist on the basis of the *Abbott* ruling.

Abbott's exceedingly limited applicability is demonstrated by the very cases that Petitioners describe as "following" the *Abbott* decision. In the first of those cases, *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996) (Cert. Pet. at 10), Judge Easterbrook did state that "[w]e follow *Abbott Laboratories*, which has strong support from the statutory text [of 28 U.S.C. § 1367]". *Id.* at 930. *Stromberg*,

however, unlike *Abbott*, was not a class action. It involved only two plaintiffs, one whose claims exceeded the amount in controversy requirement of 28 U.S.C. § 1332 and one whose did not. It was not a case that raised the same sorts of issues that arise in the class action context, where there can be many small claims. Nor was it a case that supports Petitioners' argument that *Abbott* will throw open the doors of the federal courts to a plethora of class actions that should be prosecuted in the state courts. Wholly apart from *Abbott*'s analysis of 28 U.S.C. § 1367, *Stromberg* involved precisely the kind of situation that pendent or supplemental jurisdiction has always been understood to cover. As Judge Easterbrook explained:

> "The two plaintiffs are affiliated corporations under common control. The claims arose out of the same construction project. According to the complaint, the defendants pursued a single course of action . . . . [F]actual and legal issues are identical. This strikes us as exactly the sort of case in which pendent-party jurisdiction is appropriate. It is two for the price of one: to decide either plaintiff's claim is to decide both, and neither private interests nor judicial economy would be promoted by resolving Stromberg's claim in federal court while trundling Comfort Control off to state court to get a second opinion."

Id. at 932.

In *Channell v. Citicorp Nat'l Serv., Inc.*, 89 F. 3d 379 (7th Cir. 1996) (Cert. Pet. at 19), Judge Easterbrook held that federal jurisdiction existed, pursuant to 28 U.S.C. § 1367, over a state law *counterclaim* that had been asserted by a *defendant* against a class whose suit "rest[ed] on the federal-question jurisdiction of 28 U.S.C. § 1331". *Id.* at 384. Thus, *Channell*, like *Stromberg*, also does not implicate the class action floodgates risk that Petitioners purport to find in *Abbott*.

Petitioners' other Seventh Circuit case, *In re Brand Name Prescr. Drugs Antitrust Litig.*, 123 F.3d 599 (7th Cir. 1997)

(Cert. Pet. at 10), also demonstrates *Abbott*'s limited impact. In that case, Chief Judge Posner mentioned in passing that the Seventh Circuit had "signified our agreement with" *Abbott*, *id.* at 607, but went on to hold that since none of the representative plaintiffs there satisfied the amount in controversy requirement of 28 U.S.C. § 1332, the *Abbott* ruling necessarily led to the conclusion that federal jurisdiction did not exist over a state law class action that had been removed to federal court. *Id.* at 607-09. Judge Posner found that neither the $500 penalty under Alabama law for each instance of injury nor the state plaintiffs' request for punitive damages nor the cost to the defendants of complying with the injunction that the plaintiffs sought would result in any class member's satisfying the amount in controversy requirement. *Id.* The *Brand Name Prescr. Drugs* case, therefore, demonstrates the limited nature of the *Abbott* ruling.

The district court decisions that Petitioners cite are no different. In *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 60 (D. Mass. 1997) (Cert. Pet. at 14 n.1), there was federal question jurisdiction under 28 U.S.C. § 1331, and the court exercised pendent jurisdiction over certain state law fraud claims. That, of course, is classic pendent claim jurisdiction under *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), and the Duhaime court, therefore, expressly identified its citation to *Abbott* as an "[a]lternative[]". *Id. See also Leszczynski v. Allianz Ins.*, 176 F.R.D. 659 (S.D. Fla. 1997) (Cert. Pet. at 14 n.1) (*Abbott* citation dictum because diversity jurisdiction existed as to one claim and the court exercised *Gibbs*-type pendent jurisdiction over two other claims involving the same parties); *Howard v. Globe Life Ins. Co.*, 973 F. Supp. 1412, 1415-16 (N.D. Fla. 1996) (Cert. Pet. at 14 n.1) (federal jurisdiction lacking over a class asserting state law fraud claims because "no single plaintiff's claim satisfies the amount in controversy requirement"); *Gilmer v. Walt Disney Co.*, 915 F. Supp. 1001, 1013-14 (W.D. Ark. 1996) (Cert. Pet. at 14 n.1) (*Abbott* citation dictum because federal diversity

jurisdiction was based on a ruling that any punitive damages award would constitute a common fund).

Thus, as the cases cited by Petitioners themselves demonstrate, *Abbott* is a decision of greatly restricted applicability. It fails to raise an issue of national importance sufficient to justify this Court's granting the writ.

II. THE *ABBOTT* RESULT WAS CAUSED BY LOUISIANA'S EXCEPTIONAL CLASS ACTION ATTORNEY'S FEES STATUTE, WHICH UNDERSCORES *ABBOTT*'S GREATLY LIMITED APPLICABILITY.

Under Art. 595, "[t]he court may allow *the representative parties* their reasonable expenses of litigation, *including attorney's fees*, when as a result of the class action a fund is made available, or a recovery or compromise is made which is beneficial to the class". (Emphasis added.) The Fifth Circuit in *Abbott* held that "[t]he plain text of the first sentence of 595 awards the fees to the 'representative parties,'" as a result of which "the individual claims of the class representatives met the requisite jurisdictional amount" under 28 U.S.C. § 1332. 51 F.3d at 526-27. The court went on to hold that, in such a situation, diversity jurisdiction exists, pursuant to 28 U.S.C. § 1332, over the representative plaintiffs' claims and supplemental jurisdiction exists, pursuant to 28 U.S.C. § 1367, over the claims of absent class members that fail to satisfy the jurisdictional amount. *Id.* at 529.

The important point for present purposes is that the only reason the Fifth Circuit reached the question of the applicability of section 1367 to absent class members was because of the effect (unchallenged here) of Art. 595 on diversity jurisdiction over the representative plaintiffs. Art. 595 created a "lumpy" class—a highly unusual situation—where the representative plaintiffs' claims far exceeded the claims of the rest of the class. Respondents have found no statute in any other state that, like Art. 595, awards attorney's fees to the representative

plaintiffs in a class action. Thus, "lumpiness" derived from that kind of statute is confined to class actions originating in Louisiana state court and, therefore, does not present an issue of transcendent national importance sufficient to justify review by this Court.

The same conclusion arises, as discussed *supra* at 6-9, from a survey of the cases cited by Petitioners that "follow" *Abbott*. In none of those cases was federal jurisdiction dependent upon the existence of a "lumpy" class. *Abbott* stands alone in that respect.

The greatly limited nature of *Abbott* is further apparent from an analysis of the 20 indirect purchaser infant formula class actions filed by Petitioners' counsel in states other than Louisiana. None of those other infant formula cases had a "lumpy" class. In none of them was there a state statute anything like Art. 595. In fact, each of the eight times that Respondents sought to remove one of the cases, it was remanded to the state court from which it came.

Thus, in *Lauderdale v. Abbott Labs.*, Civil Action No. 94-0659-B-C (S.D. Ala. April 4, 1995) (Appendix ("App.") at 1a-6a), the court ordered the action remanded because Respondents failed to show that any class member satisfied the amount in controversy requirement. In *Lambert v. Abbott Labs.*, Civil Action No. 94-0677-L(J) (W.D. Ky. May 23, 1995) (App. at 7a-15a), *DeVincenzi v. Abbott Labs.*, CV-S-94-527-LDG (RJJ) (D. Nev. Nov. 16, 1994) (App. at 16a-21a), *Blake v. Abbott Labs.*, 894 F. Supp. 327 (E.D. Tenn. 1995), *Buscher v. Abbott Labs.*, Civil Action No. 2:94-0422 (S.D. W.Va. Sept. 26, 1994) (App. at 22a-23a), and *Carlson v. Abbott Labs.*, Case No. 94-C-378 (E.D. Wis. July 21, 1994) (App. at 24a-29a), Respondents did not even assert diversity jurisdiction as a ground for removal; they relied solely on a claim of federal question jurisdiction, which was rejected by the court in each case. In *Moore v. Abbott Labs.*, 900 F. Supp. 26 (S.D. Miss. 1995), and *Heilman v. Abbott Labs.*, A1-94-122

(D.N.D. April 17, 1995) (App. at 30a-31a), the court remanded on the ground that Respondents failed to establish either diversity or federal question jurisdiction. In none of the other 12 cases did Respondents seek to remove on any ground.[1]

The lesson of these cases is, once again, *Abbott*'s highly unusual nature and its correspondingly limited applicability. No state of which Respondents are aware has a statute like Art. 595. In no indirect purchaser infant formula case except *Abbott*—and in no other case of any kind that Respondents have found—has *Abbott* been necessary to confer federal jurisdiction over a class where, in the absence of *Abbott*, federal jurisdiction would not have existed.

Petitioners' assertion that *Abbott* will have a "substantial impact on [federal court] resources" and will "greatly increase the number of state-law cases in federal courts" (Cert. Pet. at 18) is disproved by the facts. *Abbott* is a singular result. At most, it will lead to a few drops of additional federal litigation, not to the flood that Petitioners purport to foresee.

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[1] Respondents did successfully remove one other state indirect purchaser infant formula class action—a case that was filed in Massachusetts state court by counsel other than those representing Petitioners. *See Boos v. Abbott Labs.*, Civil Action No. 95-10091-NG (D. Mass. Aug. 18, 1995) (App. at 32a-43a). There, the court held that the financial impact on Respondents of the declaratory relief sought by the class was sufficient to satisfy the amount in controversy requirement of 28 U.S.C. § 1332. App. at 41a-42a. In dictum, the court also stated that removal was consistent with the ruling in *Abbott*. App. at 35a-41a. In doing so, the court expressed the view that Mass. Gen. Laws ch. 93A, § 9(4), was "not at all unlike" Art. 595. App. at 38a. That, however, is not correct. The Massachusetts statute merely awards attorney's fees in a successful antitrust case to "the petitioner"; unlike Art. 595, it does not expressly attribute attorney's fees in all class actions to the representative plaintiffs. Statutes like the one in Massachusetts are generally construed to require a pro rata allocation of attorney's fees to *all* class members for purposes of calculating the amount in controversy. *See, e.g., Goldberg v. CPC Int'l Inc.*, 678 F.2d 1365, 1367 (9th Cir.), *cert. denied*, 459 U.S. 945 (1982).

III. THE FIFTH CIRCUIT'S DECISION IN *ABBOTT* WAS CORRECT

In *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), this Court ruled that each class member in a class action "must satisfy the jurisdictional amount" and that any class member who fails to do so "must be dismissed from the case". *Id.* at 301. As a result, the Court affirmed a lower court ruling that exercised jurisdiction, pursuant to 28 U.S.C. § 1332, over only those class members whose claims exceeded the amount in controversy requirement and dismissed the other members of the class. *Id.* at 292, 301.

Seventeen years later, Congress enacted 28 U.S.C. § 1367. Pursuant to the new statute, a district court that has "original jurisdiction" over some plaintiffs may exercise "supplemental jurisdiction" over any other plaintiffs who have "claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy". It is quite straight forward to apply 28 U.S.C. § 1367 to the facts of *Zahn*. As this Court held, the district court there did have (and properly exercised) "original jurisdiction", pursuant to 28 U.S.C. § 1332, over those class members who satisfied the jurisdictional amount (even though other members of the class had to be dismissed from the case). With the district court having "original jurisdiction" over some plaintiffs, 28 U.S.C. § 1367 allows it to exercise "supplemental jurisdiction" over the remainder of the class, because their claims obviously "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy".

That is precisely what the Fifth Circuit held in *Abbott*, 51 F.3d at 529, and—based upon the plain and unambiguous language of 28 U.S.C. § 1367—it is manifestly correct. The Fifth Circuit supported its conclusion by pointing out that, although there are specifically enumerated exceptions in 28 U.S.C. § 1367(b) to a district court's ability to exercise

supplemental jurisdiction, class actions are not among them. *Id.* at 527. That is also manifestly correct.

Especially where a statute prescribes exceptions by express reference to particular Federal Rules of Civil Procedure, the fact that the list fails to include Rule 23 necessarily means that Rule 23 is not among the exceptions. The absence from the list of Rule 23 cannot be altered by the courts. In the words of this Court in *Iselin v. United States*, 270 U.S. 245, 251 (1926) (emphasis added), to add Rule 23 to the list of exceptions in 28 U.S.C. § 1367 would be "not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. *To supply omissions transcends the judicial function.*" *See also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (a statute's failure to include an item in a list of specific exemptions "mean[s] that under the maxim expressio unius est exclusio alterius, we must presume that" Congress did not intend the item to be exempted).

This Court has uniformly rejected interpretations that have inserted new references or requirements into statutes—as would be necessary if Rule 23 were to be read into 28 U.S.C. § 1367. That approach "would be to add a material element to the [statute], and thereby to create, not to expound, a provision of law". *Crooks v. Harrelson*, 282 U.S. 55, 58 (1930). If applying the plain language of section 1367 leads to an "objectionable" result, "in such case the remedy lies with the lawmaking authority, and not with the courts". *Id.* at 60. Where Congress has acted "in plain terms, as it has done here, it is not within the province of the court to modify the law by construction". *Id.* at 61. As this Court pointedly stated in *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (citations omitted; emphasis added):

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the

> constitutional authority of the lawmaking body which passed it, the *sole function of the courts is to enforce it according to its terms*."

Petitioners assert (incorrectly) that, in this case, that approach will lead to an expansion in federal jurisdiction and an enlargement of the federal courts' case load. Even if this were true, that "is no reason why the courts should refuse to enforce [section 1367] according to its terms". *Caminetti v. United States*, 242 U.S. at 490. "Such considerations are more appropriately addressed to the legislative branch of the government, which alone had authority to enact and may, if it sees fit, amend the law." *Id.* at 490-91. This Court has sternly cautioned that:

> "[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our Constitution vests such responsibilities in the political branches."

Tennessee Valley Auth. v. Hill, 437 U.S. at 195. In short, the "task" of the courts "is to apply the [statutory] text, not to improve upon it". *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989). That is what the Fifth Circuit in *Abbott* did.

Moreover, legislative consideration of issues like those raised by Petitioners is actually going on at this time. Congress has before it legislation that would amend the diversity statute, 28 U.S.C. § 1332, in a way that would expand federal jurisdiction over class actions filed in state courts beyond anything about which Petitioners complain here. On September 23, 1999, the House of Representatives passed the Interstate Class Action Jurisdiction Act of 1999, H.R. 1875, 106th Cong., which would amend section 1332 to extend federal jurisdiction to cover class actions in which, subject to certain exceptions, there is partial diversity of citizenship between any class

member and any defendant and the aggregate amount in controversy exceeds $1 million. 145 Cong. Rec. H8563-05.[2] The House bill has been transmitted to the Senate, which has a similar bill with an amount in controversy requirement of $75,000, S. 353, pending in committee.[3] The current congressional debate on this matter is yet another reason why the Court should deny the writ and give the political branches an opportunity to act.

Petitioners argue, as they did below, that legislative history shows that the Fifth Circuit's reading of 28 U.S.C. § 1367 is inconsistent with the intent of Congress. But where, as here, the statute is clear and unambiguous on its face, it is the language of the statute—not the legislative history—that establishes congressional intent. Indeed, the very same argument was made and rejected in *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98-99 (1991) (emphasis added), where the Court stated, in a passage particularly pertinent to this case, that:

> "The best evidence of [congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—*we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process*."

In *West Virginia Univ. Hospitals*, it was asserted—as it is here—that Congress "would have" included an item in a list prescribed in 42 U.S.C. § 1988 "had it thought about it", but "Congress simply forgot". *Id.* at 100. Even if true, this Court held—in language dispositive of Petitioners' identical argument—that supplying the missing item "profoundly mistakes our role". *Id.*

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[2] The text of H.R. 1875 can be found in App. at 44a-51a.

[3] The text of S. 353 can be found in App. at 52a-62a.

The Court's approach in *West Virginia Univ. Hospitals* is consistent with a long line of cases. As the Court explained in *Immigration and Naturalization Serv. v. Phinpathya*, 464 U.S. 183, 189 (1984) (internal quotation marks and citations omitted):

> "This Court has noted on numerous occasions that in all cases involving statutory construction, our starting point must be the language employed by Congress, . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used."

Similarly, in *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994), the Court rejected an appeal to legislative history because "it is the statute, and not the Committee Report, which is the authoritative expression of the law". The Court made the same point in *Tennessee Valley Auth. v. Hill*, 437 U.S. at 185 n.29, where it stated that "[w]hen confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning"; in such a situation "it is not necessary to look beyond the words of the statute".[4]

This Court's decision in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994), which was expressly relied upon by the Fifth Circuit in *Abbott*, 51 F.3d at 529, makes the

[4] *See also Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29-30 (1989) (Scalia, J., concurring in part and dissenting in part) (the Court's "task" is not "to plumb the intent of the particular Congress that enacted a particular provision"; "[i]t is our task, as I see it, not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times"); *Caminetti v. United States*, 242 U.S. at 490 ("it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source").

point that a court is justified in ignoring the unambiguous language of a statute only if a plain reading would "produce results that were not merely odd, but positively absurd". *See also Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (the Court may look beyond the plain language of "a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result"); *Crooks v. Harrelson*, 282 U.S. at 59-60 (only in the "rare and exceptional circumstances" where applying "the literal terms of a statute" would "lead[] to absurd results" can the Court "justify a departure from the letter of the law"); *Caminetti v. United States*, 242 U.S. at 490 (the plain language of a statute "is the sole evidence of the ultimate legislative intent" unless it "lead[s] to absurd or wholly impractical consequences").

That is certainly not the case with regard to the statutory language of 28 U.S.C. § 1367 as read by the Fifth Circuit in *Abbott*. Justice Brennan's dissent in *Zahn* (joined by Justices Douglas and Marshall), 414 U.S. at 302-12, forcefully explicates the reasons why federal supplemental jurisdiction should be permitted over class members who do not satisfy the amount in controversy requirement whenever original federal jurisdiction exists over the representative plaintiffs.[5] A number of commentators share the same view. See *Abbott*, 51 F.3d at 529 (citing commentators). *See also Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. 808, 819 (E.D. Pa. 1997) (adopting the Fifth Circuit's literal reading of 28 U.S.C. § 1367 "would not be absurd; arguably it would be sensible").

[5] *See id.*, 414 U.S. at 308-09 (Brennan, J., dissenting) ("Not only does the practical desirability of sustaining ancillary jurisdiction bring Rule 23(b)(3) class actions within the logic of our decisions, but the Court has long since recognized that fact, and has sustained ancillary jurisdiction over the nonappearing members in a class action who do not meet the requirements of traditional rule of complete diversity").

Petitioners claim that the fact that some courts disagree with *Abbott* "lends credence to the argument that Section 1367 is ambiguous and therefore that reference to legislative history is appropriate". Cert. Pet. at 21. But that is a mere bootstrap. Those contrary decisions cannot change the plain language of the statute. Petitioners' argument actually puts the cart before the horse. It presumes ambiguity where the statutory text might be perfectly clear. It makes the whole analysis a self-fulfilling prophecy—*i.e.*, it takes the position that "because I disagree with others, there must therefore be ambiguity". That is not correct. *Before* resort can be made to legislative history, there has to be a showing that ambiguity does indeed exist in the language of the statute itself. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

As this Court stated in *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (internal quotation marks and citations omitted; emphasis added), in language that provides the clear rule of decision here:

> "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. *When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.*"

See also Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. at 123 (internal quotation marks and citations omitted) ("with a statute, when we find the terms . . . unambiguous, judicial inquiry is complete").

There is no ambiguity in the language of 28 U.S.C. § 1367. As Judge Pollak conceded in *Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. at 811, 813, section 1367 "parsed literally" and "on its face" does confer supplemental jurisdiction over absent class members so long as original federal jurisdiction

exists over the representative plaintiffs.[6] *See also Patterson Enterprises, Inc. v. Bridgestone/Firestone, Inc.*, 812 F. Supp. 1152, 1154-55 (D. Kan. 1993) ("the plain meaning of the language of [28 U.S.C. § 1367] has the effect of overruling *Zahn*"; "the legislative history is not useful in interpreting the unambiguous provisions of this statute as they relate to a case such as this one"); *Garza v. National Am. Ins. Co.*, 807 F. Supp. 1256, 1258 (M.D. La. 1992) ("this Court finds that the Congress said what it meant and that the Congress meant what it said—the language of § 1367 unavoidably overrules these pre-§ 1367 cases in those instances where the requirements of § 1367(a) are fulfilled and the exceptions of § 1367(b) are inapplicable").

Finally, extending supplemental jurisdiction to absent class members whose claims fall below the amount in controversy specified in 28 U.S.C. § 1332 raises no greater federalism concern and causes no greater expansion of federal jurisdiction than extending supplemental jurisdiction to absent class members who fail the diversity of citizenship requirement that is also specified in 28 U.S.C. § 1332. Yet that is what this Court did in *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), even though the result implicated a limiting policy of federal diversity jurisdiction that is no less important than the amount in controversy. As Justice Brennan pointedly commented in his dissent in *Zahn*:

> "Particularly in view of the constitutional background on which the statutory diversity requirements are written, it is difficult to understand why the practical approach the

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[6] Having reached that conclusion, and having found that such a result "would not be absurd; arguably it would be sensible", *id.* at 819, Judge Pollak then improperly went on to review the legislative history, which led him to decide not to follow the plain and unambiguous language of the statute. Hence, the *Russ* decision, although disagreeing with *Abbott*, hardly supports--indeed, it directly refutes--the notion that 28 U.S.C. § 1367 is ambiguous.

> Court took in *Supreme Tribe of Ben-Hur* must be abandoned where the purely statutory 'matter in controversy' requirement is concerned."

414 U.S. at 309 (Brennan, J., dissenting; citations omitted).

With the enactment of 28 U.S.C. § 1367, the "practical approach" of *Supreme Tribe of Ben Hur* now does apply to the amount in controversy requirement as well. That result is compelled by the statute's plain language, and there is no constitutional or policy reason why it should be otherwise.

CONCLUSION

For the reasons described above, the petition for a writ of certiorari should be denied.

October 15, 1999.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

KAREN LAUDERDALE, SUING ON BEHALF OF HERSELF INDIVIDUALLY AND ON BEHALF OF PERSONS SIMILARLY SITUATED,

Plaintiffs,

v.

ABBOT LABORATORIES, ET AL.,

Defendants.

Civil Action No. 94-0659-B-C

ORDER

This matter is before the court on the plaintiff's motion to remand (tab 11). After consideration of the parties' arguments, the motion is GRANTED.

FACTS

The plaintiff, Karen Lauderdale, initially brought this action in the Circuit Court of Mobile County pursuant to Alabama Rule of Civil Procedure 23, which covers class actions. In her complaint, the plaintiff alleges that the defendants conspired to fix the price of infant formula in Alabama from January 1980 to December 1992, and seeks a declaratory judgment that the defendants engaged in the alleged conspiracy, as well as recovery for a violation of §6-5-60, Code of Alabama (1975), which allows anyone injured by an

unlawful trust to recover $500 for each instance of injury in addition to actual damages. Each member of the class seeks up to $49,000.00, exclusive of interest and costs.

DISCUSSION

Despite the defendants' suggestions to the contrary, it is well established in this circuit that the burden on a motion to remand rests with the removing party. *Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F.2d 252, 253 (5th Cir. 1961). To satisfy their burden, the defendants must show that "it does not appear to a legal certainty that [the plaintiff's] claim is really for less than the jurisdictional amount." *Opelika Nursing Home, Inc. v. Richardson*, 448 F.2d 658, 663 (5th Cir. 1971). In other words, "if by a reasonable probability it appears that there is an amount in controversy exceeding the jurisdictional amount, calculated pursuant to some realistic formula, the defendants have met their burden." *Mutual First, Inc. v. O'Charley's of Gulfport, Inc.*, 721 F.Supp. 281, 282 (S.D. Ala. 1989). In addition, the defendants must overcome the narrow construction this court is required to apply to its diversity jurisdiction. *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 76-77 (1941).

The defendants contend that each prospective plaintiff meets the jurisdictional requirement, but the argument is unconvincing. Given the fact that at this point no one can say how many times each prospective plaintiff purchased infant formula supplied by the defendants, there is simply no "realistic formula" to be applied to determine if each class member meets the jurisdictional amount. For example, grandparents who took care of a grandchild a few times a year during the period at issue (and purchased formula on those occasions) would certainly qualify as class members, but would also likely fall far short of the $50,000.00 damage requirement. Since there is no

way to know at this point, and jurisdiction cannot be based upon speculation,[1] the defendants' argument on this issue fails.

The defendants' primary and best argument focuses on whether the class members' claims can be aggregated to meet the jurisdictional amount.[2] The claims may be aggregated to satisfy the amount in controversy only if the class members are "enforc[ing] a single title or right in which they have a common and undivided interest", as opposed to "separate and distinct demands". *Zahn v. International Paper Co.*, 414 U.S. 291, 294 (1973) (quoting *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911)); *see also Snyder v. Harris*, 394 U.S. 332 (1969). While this standard has been applied in a number of cases, no bright dividing line has emerged; as one district court aptly observed, "the case law on aggregation is more susceptible to clever manipulation by counsel than it is to reasoned analysis." *Nat. Organization for Women v. Mutual of Omaha Ins.*, 612 F.Supp. 100, 105 (D.D.C. 1985).

A variety of tests have been used to put the admonitions of *Zahn* and *Snyder* into effect. The Sixth Circuit has observed that "[a]n identifying characteristic of a common and undivided interest is that if one plaintiff cannot or does not collect his share, the shares of the remaining plaintiffs are increased", *Sellers v. O'Connell*, 701 F.2d 575, 579 (6th Cir. 1983), while the Seventh Circuit has held that a common and undivided interest exists "where only the class as a whole is entitled to the relief requested." *Bassett v. Toyota Motor Credit Corp.*, 818 F.Supp. 1462, 1467 (S.D. Ala. 1992) (citing *Griffith v. Sealtite Corp.*, 903 F.2d 495, 498 (7th Cir. 1990)). Along the same lines, the former Fifth Circuit held that "if plaintiffs' rights are not affected by the rights of the co-plaintiffs then there can be no aggregation." *Eagle Star Ins. Co. v. Maltes*, 313 F.2d 778,

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[1] See *Vicksburg, S & R.R. Co. v. Nattin*, 58 F.2d 979, 980 (5th Cir. 1932).

[2] The representative plaintiff implicitly concedes that, if the claims may be aggregated, the jurisdictional amount has been met.

781 (5th Cir. 1963). All of these approaches suggest the claims here should not be aggregated, since each individual plaintiff would only be entitled to a sum based on the amount they themselves were overcharged, but are individually entitled to that sum, regardless of the claims of their co-plaintiffs.

The *Nat. Organization for Women* Court, summarizing a number of related cases, came up with the following three general rules.

> First, many of the cases that permit aggregation were federal question cases in which the court may have been stretching to find a way to provide a federal forum to vindicate federal rights. (cites omitted). Second, the cases that allow aggregation often speak of the presence of some fund to which a plaintiff class is seeking access. (cites omitted). Finally, they often involve an attempt to enforce a right that belongs to a group. (cites omitted).
>
> *Nat. Organization for Women, 612 F.Supp. at 107.*

This case clearly fails the first and third rules (since there is no federal question and the right at issue belongs to each individual plaintiff rather than the class, as the Alabama statute makes clear)[3] , and at least arguably fails the second one (since no settled fund is at stake or openly sought by the plaintiffs).[4]

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[3] *See* Code of Alabama 1975 § 6-5-60 ("Any person, firm, or corporation injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of $500 and all actual damages. . .").

[4] In the aggregation cases cited by the defendants for the proposition that a common fund is at stake here, each class of plaintiffs were seeking the establishment of such a fund. *See Berman v. Narragansett Racing Association*, 414 F.2d 311, 315 (1st Cir. 1969) ("plaintiffs make no specific claims for individual payments") ; *Hughes v. Const. Co., Inc. v. Rheem Mfg. Co.*, 487 F.Supp. 345, 350 (N.D. Miss. 1980) (plaintiff stated in complaint that "the damages to be recovered will be in the form of this common fund for all class members"). In this case, by contrast, the plaintiffs are not attempting to set up a fund, but rather are pursuing individual claims.

In addition, several courts have held that, when there is a separate contract between each individual plaintiff and the defendant, the claims arising from those contracts are separate and distinct and cannot be aggregated to meet the jurisdictional amount. *Fennell v. Ohio Casualty Ins. Co.*, 1993 U.S. Dist. LEXIS 5295, *5 (M.D. Fla. 1993) ; *Averdick v. Republic Financial Services. Inc.*, 803 F.Supp. 37 (E.D. Ky. 1921); *Indianer v. Franklin Life Ins. Co.*, 113 F.R.D. 595 (S.D. Fla. 1986). Each separate purchase of infant formula by each individual plaintiff in this case constitutes a separate contract, which forms the theoretical basis of each plaintiff's claim. *See* Uniform Commercial Code § 2-106 (defining contract for sale as "both a present sale of goods and a contract to sell goods at a future time"). This fact also suggests that each claim is independent.[5]

Finally, there is little that separates this case from *Snyder* and *Zahn*, the cases which established the principle at issue. In *Snyder*, which addressed two related district court class action cases, the first plaintiff sued a company's board of directors on the grounds that they had sold their shares in the company for far above the fair market value, and asked that the excess be distributed among the shareholders. In the companion case, the plaintiffs alleged that the defendant gas company had overcharged its customers, and sought to retrieve the overcharged amount. The Supreme Court held that both claims were separate and distinct. In *Zahn*, a group of landowners sued the defendant paper company for allegedly polluting Lake Champlain, on which the plaintiffs' property stood. once again, despite the seemingly shared interest, the Supreme Court found that the claims could not be aggregated. Nothing in the defendants' brief distinguishes those decisions from the one

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[5] Moreover, it provides an additional ground for distinguishing *Berman*, 414 F.2d at 315, in which no individual contractual rights were alleged.

before this court, or explains why a common fund was not at stake there, but somehow is at stake here.

Bearing in mind the earlier admonition about the manipulability of the cited tests, it remains significant that each one points against aggregation. Combined with the fact that the defendants bear the burden on the issue, and the strict construction the court must give to its diversity jurisdiction, the consistency of results dictates that the plaintiffs' motion should be, and therefore is, GRANTED. It is so ORDERED.

DONE this the 4th day of April, 1995.

/s/ Charles R. Butler, Jr.
CHIEF DISTRICT JUDGE

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

JAY and CICELY LAMBERT, GLENN and ROSSANA WHITE, GUS G. and STEVINE DALEURE, and MICHAEL C. and JO ELLEN WILSON,

Plaintiffs,

v.

ABBOTT LABORATORIES, INC., and BRISTOL-MYERS SQUIBB, and MEAD JOHNSON & COMPANY,
DEFENDANTS,

Defendants.

Civil Action No. 94-0677-L(J)

MEMORANDUM OPINION

Plaintiffs brought the present action on behalf of those who, from January 1980 through December 1992, have indirectly purchased infant formula within the Commonwealth of Kentucky from named defendants. In their complaint, plaintiffs alleged that defendants' conduct constituted a restraint of trade or commerce in violation of the Kentucky Consumer Protection Act, K.R.S. § 367.175, and Kentucky common law. They also alleged that defendants' actions constituted an unfair trade practice in violation of the Kentucky Consumer Protection Act, K.R.S. § 367.170. Plaintiffs originally filed this suit in Jefferson Circuit Court, Division Fifteen, in Louisville,

Kentucky. In November 1994, defendants removed the suit to this court on the grounds of federal question and diversity jurisdiction. (Dkt. 1.) Plaintiffs then moved to remand under 28 U.S.C. § 1447(c) based on lack of subject matter jurisdiction. (Dkt. 5.) For the reasons that follow, plaintiffs' motion to remand will be granted.

The Supreme Court, in *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391-92, 107 S.Ct. 2425, 2429 (1987), provided a "jurisdictional framework governing removal of federal question cases from state into federal courts." The *Caterpillar* Court wrote:

> Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal-question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

Caterpillar, 482 U.S. at 392, 107 S.Ct. at 2429 (footnote omitted). Under the "well-pleaded complaint" rule, plaintiffs are the "masters" of their complaint, and the "fact that the wrong asserted could be addressed under either state or federal law does not ordinarily diminish" the plaintiffs' right to choose a state law cause of action. *Alexander v. Electronic Data Systems Corporation*, 13 F.3d 940, 943 (6th Cir. 1994).

An exception to the well pleaded complaint rule exists when plaintiffs "artificially plead" their complaint "in order to avoid federal jurisdiction of claims that are federal in nature". *Her Majesty the Queen In Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 339 (6th Cir. 1989) (citing

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2, 101 S.Ct. 2424, 2427 n.2 (1981); 14A C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 3722 at 270 (1985)). Pursuant to the "artful pleading" doctrine, a court "may recharacterize a plaintiffs claims as federal if 'the particular conduct complained of [is] governed exclusively by federal law.'" *Redwood Theatres v. Festival Enterprises, Inc.*, 908 F.2d 477, 479 (9th Cir. 1990) (quoting *Hunter v. United Van Lines*, 746 F.2d 635, 640 (9th Cir. 1984), *cert. denied*, 474 U.S. 863, 106 S.Ct. 180 (1985)). The Supreme Court has applied the artful pleading doctrine when a state claim is completely preempted by federal law, *Caterpillar*, 482 U.S. at 393, 107 S.Ct. at 2430, or when a state claim has already been decided in a previous federal suit, *Moitie*, 452 U.S. at 397 n.2, 101 S.Ct. at 2427 n.2.

In their motion to remand, plaintiffs argue that under the "well-pleaded complaint" rule, they are entitled to plead a state law cause of action. In response, defendants contend that the allegations in the complaint are "cognizable solely under federal antitrust law." They state that under the "artful pleading" doctrine, removal is proper. Defendants rely on *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424 (1981), *In re Wiring Device Antitrust Litigation*, 498 F.Supp. 79 (E.D.N.Y. 1980), and *Mechanical Rubber & Supply Co. v. American Saw and Mfg. Co.*, 747 F.Supp. 1292 (C.D.Ill. 1990) for the proposition that removal to federal court was warranted. In Moitie, plaintiffs' antitrust claims were dismissed on their merits in a federal district court. After the claims were dismissed, plaintiffs filed a state court action based on the same facts as the one previously filed in federal court. Defendants removed the claims to federal court, where the district court again dismissed plaintiffs' claim under the doctrine of res judicata. Approving the district court's decision, the Supreme Court provided:

> We agree that at least *some* of the claims had a sufficient federal character to support removal. . . . After "an extensive review and analysis of" the origins and substance of the two complaints, [the district court] found, and the Court of Appeals expressly agreed, that respondents had attempted to avoid removal jurisdiction by "artful[ly]" casting their "essentially federal law claims" as state law claims. *We will not question here that factual finding.*

Moitie, 452 U.S. at 397 n.2, 101 S.Ct. 2427 n.2 (emphasis added).

Moitie is distinguishable from the present suit. In *City of Detroit*, the Sixth Circuit wrote: "[C]ourts applying *Moitie* have made it quite clear that it *applies only to the removal of state claims barred by a prior federal judgment*." *City of Detroit*, 874 F.2d at 342 (emphasis added). Unlike the plaintiffs in *Moitie*, plaintiffs in the present suit have not previously sued defendants in federal court. Further, the Supreme Court did not expressly hold that removal was proper; instead, the Court, in a footnote, stated that it would not "question" the "factual finding" of the district court. The narrow *Moitie* exception is inapplicable, and removal will not be granted on these grounds. *See Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 477, 480 (9th Cir. 1990); *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1376 (9th Cir. 1987), *cert. denied*, 484 U.S. 850, 108 S.Ct. 150 (1987).

Defendants' reliance on *In re Wiring Device* and *Mechanical Rubber & Supply* must also fail. In both of these cases, a federal district court allowed defendants to remove state antitrust actions to federal court. The court does not believe that federal question jurisdiction should be interpreted as broadly as the *Wiring Device* or *Mechanical Rubber &*

Supply Courts understood it to be.[1] The court cannot ignore the most recent opinions cited by plaintiffs: *Free, et al v. Abbott Labs*, et al., Civil Action No. 93-971-A (M.D. La. April 5, 1994); *Carlson v. Abbott Labs*, et al., Case No. 94-C378 (E.D. Wisc. July 21, 1994); *DeVincenzi, et al v. Abbott Labs*, et al., Case No. 94-527-LDG (D.Nev. November 14, 1994); *Buscher, et al v. Abbott Labs*, et al., Civil Action No. 2:94-0422 (S.D.W.Va. Sept. 26, 1994); and *Blake v. Abbott Labs*, et al., Civ. Action No. 3:94-CV-286 (E.D.Tenn. March 2, 1995). These cases involved the same question as the present one, i.e. whether state antitrust law creates federal question jurisdiction. Each federal district court held that no federal question jurisdiction was created and remanded the suits to state court. These cases indicate that state antitrust law does not invoke federal question jurisdiction and that removal is improper.[2]

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[1] In *Corporate Travel Consultants, Inc. v. United Airlines, Inc.*, 799 F.Supp. 58 (E.D.Ill. 1992), the *Mechanical Rubber & Supply* decision was criticized as being overly broad by a federal district court in Illinois. In a footnote, the United Airlines Court wrote:

> *Mechanical Rubber & Supply Co. v. American Saw & Mfg. Co.*, 747 F.Supp. 1292 (C.D.Ill. 1990) . . . is not persuasive. Acknowledging that it relies upon no law, because it can find none and the defendant cites none, and that the federal antitrust laws do not preempt the state antitrust laws, the district court nonetheless concludes that plaintiff's complaint is federal in nature. *Id.* at 1296. The court states that "federal antitrust laws apply to acts affecting or occurring in the flow of commerce and that the Illinois antitrust laws apply to acts affecting intrastate commerce," because Illinois would not extend its antitrust laws to burden interstate commerce. *Id.* Because the Supreme Court has indicated that little of the artful pleading exception exists beyond preemption, this court does not believe that it would be wise to adopt the broad rule stated by the district court in *Mechanical Rubber*.

United Airlines, 799 F. Supp. at 60 n. 1

[2] Defendants do not distinguish the cases cited by plaintiffs; rather, citing *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424 (1981), they argue that they were all wrongly decided.

Further, plaintiffs' state antitrust claims are not preempted by federal law. Complete preemption exists when "the preemptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393, 107 S.Ct. at 2430. In other words, a court will find complete preemption if "federal law has entirely preempted the field in question." *City of Detroit*, 874 F.2d at 342. State claims are preempted and "therefore removable to federal court only when there is a 'clearly manifested' intent by Congress." *Id.*

Here, Congress has not intended for federal antitrust to preempt state antitrust law. In *California v. ARC America Corporation*, 490 U.S. 93, 102, 109 S. Ct. 1661, 1665 (1989), the Supreme Court explained that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." Further in *City of Detroit*, the Sixth Circuit stated that only three instances exist in which the Supreme Court has found complete preemption: (1) in relation to section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; (2) concerning the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461; and (3) concerning Indian rights. *City of Detroit*, 874 F.2d at 342 (citations omitted). Defendants cannot remove the case based on preemption.

Defendants also maintain that removal is proper because Kentucky antitrust law applies only to conspiracies that are predominantly *intra*state, as opposed to *inter*state. They argue that the facts alleged in plaintiffs' complaint encompasses a conspiracy that transpired throughout the entire United States, and must be exclusively considered under federal law. K.R.S. § 367.175(l) provides:

> Every contract, combination in the form of trust and otherwise, or conspiracy, in restraint of trade or commerce in this Commonwealth shall be unlawful.

Ky. Rev. Stat. Ann. § 367.175(l) (Baldwin 1993). Kentucky courts have not stated whether the Kentucky General Assembly intended to restrict K.R.S. § 367.175 to predominantly intrastate commerce. The court will leave the interpretation of K.R.S. § 367.175 to a Kentucky court. *See In re Sugar Antitrust Litigation.*, 588 F.2d 1270, 1273 (9th Cir. 1978), *cert. denied*, 441 U.S. 932, 99 S.Ct. 2052 (1979).

Initially, defendants stated that removal was proper based on diversity jurisdiction. However, it appears that defendants conceded that removal cannot be established on these grounds. For federal diversity jurisdiction to apply in a class action, each class member must meet the required jurisdictional amount. *Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1063 (1969). In their complaint, plaintiffs alleged, in good faith, that the individual damages for each plaintiff will not amount to $50,000. Defendants failed to show that the amount for each plaintiff is more than that amount. Removal is improper based on diversity jurisdiction.

Plaintiffs' motion to remand the present suit to the Jefferson Circuit Court in Louisville, Kentucky will be granted. An appropriate order accompanies this memorandum opinion.

Dated: 5/23/95

/s/ Edward H. Johnstone

Edward H. Johnstone, Senior Judge

United States District Court

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

JAY and CICELY LAMBERT, GLENN and ROSSANA WHITE, GUS G. and STEVINE DALEURE, and MICHAEL C. and JO ELLEN WILSON,

Plaintiffs,

v.

ABBOTT LABORATORIES, INC., and BRISTOL-MYERS SQUIBB, and MEAD JOHNSON & COMPANY,
DEFENDANTS,

Defendants.

Civil Action No. 94-0677-L(J)

ORDER

For the reasons stated in a memorandum opinion this day entered, IT IS ORDERED:

(1) Plaintiffs' motion to remand the present action is GRANTED. (Dkt. 5.)

(2) The entire matter shall be TRANSFERRED to the Jefferson Circuit Court in Louisville, Kentucky.

(3) The clerk of this court is directed to transmit the entire record in the case to the clerk of the Jefferson Circuit Court in Louisville, Kentucky for all further proceedings.

(4) Plaintiffs' motion for attorneys fees and costs incurred in opposing removal is DENIED. (Dkt. 9.)

Dated: 5/23/95

/s/ Edward H. Johnstone

Edward H. Johnstone, Senior Judge

United States District Court

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LAUREL A. DEVINCENZI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED WITHIN THE STATE OF NEVADA,

Plaintiff,

v.

ABBOT LABORATORIES, BRISTOL-MYERS SQUIBB CO., AND MEAD JOHNSON & CO.,

Defendants.

CV-S-94-527-LDG (RJJ)

MEMORANDUM DECISION

On April, 27, 1994, plaintiff filed a class action in the District Court of Washoe County, Nevada, charging defendants with conspiracy to "raise, fix, maintain and stabilize at artificially high levels the wholesale prices of infant formula sold in the United States, including the State of Nevada "in violation of the Nevada Unfair Trade Practices Act ("UTPA"), Nev. Rev. Stat. §598 para. 010 et seq. (Complaint Para. 29).

On June 14, 1994, defendants alleging federal question jurisdiction removed the case to the United States District Court pursuant to Title 28, U.S.C. §§1441 and 1446. After removal, defendants moved to dismiss the Complaint for lack of standing under *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728-29 (1977). Plaintiff countermoved to remand to state court.

Defendants contend that the Nevada UTPA does not apply to price-fixing conspiracies that are predominantly interstate in nature, rather the Complaint states a federal cause of action under the Sherman Act, Title 15, U.S.C., §§ 1, et seq. Defendants argue that plaintiffs' "artfully pled" Complaint should not defeat federal jurisdiction.

Plaintiff responds that the "artful pleading" doctrine is inapplicable to this case. Since it is an exception to the well pleaded complaint rule, it is applied in only two circumstances: (1) when the complete federal preemption doctrine ousts state courts of jurisdiction to consider the claim and (2) the res judicata exception which prohibits litigation of the same claim, between the same parties in state court after it has been litigated in a federal court. Plaintiff contends that neither of the exceptions apply to the instant case and their choice of a forum must be respected. Plaintiff further argues that this Court should not consider defendants' claim that the Nevada legislature did not intend for the Nevada UTPA to apply to indirect purchasers for the reason that the nonexistence of a state cause of action is insufficient to bottom federal question removal.

Plaintiffs Motion to Remand is GRANTED. Defendants' Motion to Dismiss is DENIED.

DISCUSSION

The Artful Pleading Doctrine

The artful pleading doctrine was developed as an exception to the well pleaded complaint rule. Simply stated, this rule provides that a "party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). In the circumstance of parallel claims (state and federal) , the party may select the jurisdiction under which he wishes to proceed.

The Ninth Circuit explained in *Redwood Theatres v. Festival Enterprises*, 908 F.2d 477 (9th Cir. 1990) , limitations

on the well pleaded complaint rule. Generally a party seeking removal must identify the federal question appearing on the face of the complaint. If the federal question is not so apparent, the party seeking removal may rely on the "artful pleading doctrine" which is a narrow exception to the straightforward rules of removal jurisdiction." *Sullivan v. First Affiliated Securities*, 813 F.2d 1368, 1372 (9th Cir.), *cert. denied*, 484 U.S. 850 (1983).

The only two recognized applications of the "artful pleading rule" are when "the particular conduct complained of [is] governed exclusively by federal law." *Hunter v. United Van Lines*, 746 F.2d 635 at 640 (9th Cir. 1984), *cert. denied*, 474 U.S. 863 (1985) and when a state claim is found to be an artfully pleaded federal claim which was previously before federal court and dismissed (*res judicata* defense) *Salveson v. Western Bankcard Ass'n*, 731 F.2d 1423, 1432 (9th Cir. 1984).

The "artful pleading doctrine" is narrowly construed out of considerations of federalism, *Sullivan*, 813 F.2d at 1376, and the party invoking the removal statute bears the burden of establishing federal jurisdiction.

In the instant case neither of the exceptions to the well pleaded complaint rule applies. These plaintiffs framed their complaint under the Nevada UTPA and have never filed a parallel complaint in federal court. As to the second exception, the Supreme Court has expressly ruled that state antitrust indirect purchaser statutes are not preempted by federal law. *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989). Defendants' argument that the actions complained of involve predominately interstate transactions that affect interstate commerce with only incidental affect in Nevada or any other state was rejected by the *Redwood* court citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 128 (1978). Nor does this Court find persuasive defendants' contention that since indirect purchasers do not have standing to sue under the Sherman Act, the Nevada UTPA would be given a similar construction by the

Nevada State court. The federalism concerns expressed by this Circuit in *Sullivan*, *supra*, lead this Court to conclude that it is the province of the Nevada state courts to construe the intent of the Nevada Legislature in enacting the Nevada UTPA. This conclusion is particularly appropriate since removal jurisdiction does not turn upon whether a plaintiff has a valid state law claim but rather whether plaintiff has artfully pled a federal law claim. *In re Sugar Antitrust Litig*, 588 F.2d 1270 (9th Cir. 1978).

CONCLUSION

Defendants' motion praying that this Court retain jurisdiction and dismiss the complaint is DENIED. Plaintiff's motion that this action be remanded to the District Court of Washoe County is GRANTED.

IT IS SO ORDERED.

/s/ Mary Johnson Lowe
MARY JOHNSON LOWE
Senior U.S District Judge

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LAUREL A. DEVINCENZI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED WITHIN THE STATE OF NEVADA,

Plaintiff.

v.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB CO., AND MEAD JOHNSON & CO.,

Defendants.

CV-S-94-527-LDG (RJJ)

ORDER

After having considered the pleadings and submissions of counsel, this Court finds that plaintiff's complaint presents no federal question within the meaning of Title 28, U.S.C. §1441(b). Accordingly, it is ORDERED, that pursuant to Title 28, U.S.C. §1441(c), this civil action be, and the same hereby is, REMANDED to the District Court of Washoe County, Nevada.

The Office of the Clerk is hereby directed to send copies of this Order and the Opinion on which it is based to counsel of record herein.

Dated this 14 day of November, 1994.

/s/ Mary Johnson Lowe
MARY JOHNSON LOWE
Senior U.S District Judge

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

DEBORAH JANE BUSCHER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED WITHIN THE STATE OF WEST VIRGINIA,

Plaintiff,

v.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB CO., AND MEAD JOHNSON & CO.,

Defendants.

Civil Action No. 2:94-0422

ORDER

On August 25, 1994, came the plaintiff, by her counsel, and the defendants, by their counsel, for a hearing on plaintiff's motion to remand. Having considered the pleadings filed by the parties and the arguments of counsel, this Court finds that the plaintiff's complaint presents no federal question within the meaning of 28 U.S.C. §1441(b). Accordingly, it is ORDERED, pursuant to 28 U.S.C. §1447(c), that this civil action be, and the same hereby is, remanded to the Circuit Court of Kanawha County, West Virginia.

The Clerk is directed to send copies of this order to counsel of record herein.

DATED: September 26, 1994

/s/ Dennis R. Knapp
DENNIS R. KNAPP, JUDGE

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RICHARD R. CARLSON,

Plaintiff.

v.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB CO., AND MEAD JOHNSON & COMPANY,

Defendants.

Case No. 94-C-378

DECISION AND ORDER

This matter comes before Court on plaintiff Richard R. Carlson's ("Carlson") motion to remand the above action to Milwaukee County Circuit Court. On March 2, 1994, Carlson filed a class action suit in state court alleging that the defendants Abbott Laboratories, Bristol-Myers Squibb Company and Mead Johnson & Company (collectively, "defendants") have violated state antitrust laws in connection with the marketing and selling of infant baby formula.[1] On April 7, 1994, the defendants filed their notice of removal pursuant to 28 U.S.C., §§ 1446 and 1331 invoking this Court's

[1] There are currently pending twenty-six individual and class-actions concerning violations of the Sherman Act, 15 U.S.C. §§ 1 *et seq.* These actions have all been consolidated in the United States District Court for the Northern District of Florida. *In re Infant Formula Antitrust Litigation*, MDL Docket No. 878.

jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1441. For the reasons set forth below, Carlson's motion to remand is granted.

ANALYSIS

The issue here is whether Carlson's state law claims are actually "artfully plead" federal antitrust claims allowing this Court to retain jurisdiction. Defendants claim that Carlson is seeking to "deprive defendants of their right to have federal claims heard in federal court." (Memorandum at 1). Carlson counters that as "master of the claim", he can avoid federal jurisdiction by exclusive reliance on state law. (Memorandum at 3-4, citing, *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, in accord with the so called "well-pleaded complaint" rule as defined by the Seventh Circuit: "plaintiff picks a theory (state or federal); the theory prescribes the appropriate court, which decides the case (including the defenses)." *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1075 (7th Cir. 1992). The parties agree that there are exceptions to this general rule: (1) where "the preemptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, *supra* at 393; and (2) where the plaintiff attempts to avoid the *res judicata* effect of an adverse judgment on a federal claim by repleading the claim under state law. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). Despite defendants' authority and argument, neither situation is present here.

The core of the defendants' argument with respect to the artful pleading exception is that because Carlson's state law antitrust claims concern *inter*state commercial activity and not solely *intra*state activity, they are clearly federal in nature. Defendants argue that Wisconsin Supreme Court precedent demonstrates that Wisconsin's antitrust laws do not reach *inter*state activity and therefore, Carlson is improperly trying to have federal claims heard in state court. Carlson's purpose in using artful pleading is to escape the Supreme Court precedent

of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) and *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).[2] Numerous "artful pleading" cases are cited in support of this proposition. *Oglesby v. RCA Corporation*, 752 F.2d 272 (7th Cir. 1985); *Local 921, of Chicago & Cent. States Joint Bd., etc. v. Estate of Schmidt*, 684 F.Supp. 601 (W.D. Wis. 1988); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981); and *In re Wiring Device Antitrust Litigation*, 498 F.Supp. 79 (E.D.N.Y. 1980). However, only *Wiring Device* is on all fours with this case.[3]

The Seventh Circuit's decision in *Oglesby* is inapposite because the plaintiff attempted to assert a breach of contract claim in order to overcome certain filing limitations of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. Because plaintiff's complaint referred to "statutory rights and privileges" located in federal law, and because his employment was governed by a collective bargaining agreement, the Seventh Circuit upheld the district court's conclusion that the state claims were "artfully plead" federal claims under the LMRA. In *Local 921, of Chicago & Cent. States Joint Bd., etc.*, the Honorable John C. Shabaz reached a similar conclusion because the state claims were "inextricably dependent" upon certain obligations "which . . . are governed by a collective bargaining agreement which is subject to § 301." *Id.* at 605.[4]

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[2] Both cases make clear that only direct purchasers (not indirect purchasers like Carlson) suffer an injury within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15.

[3] Another case, not cited by the defendants, *Mechanical Rubber & Supply Co. v. American Saw and Manufacturing Co.*, 747 F.Supp. 1292 (C.D.Ill. 1990) is equally on point. Nevertheless, for the reasons set forth infra, the Court declines to follow either *Wiring Device* or *Mechanical Rubber*.

[4] In addition, these cases concerned labor disputes over which federal law reigns supreme. *Avco Corporation v. Aero Lodge No. 735, etc.*, 390 U.S. 557 (1968). The Supreme Court recently made clear that no such total preemption exists with respect to the antitrust laws. *California v. ARC*

Both of these cases are "artful pleading" cases where the plaintiffs, like Carlson, attempt to avoid federal jurisdiction from the outset. By contrast, *Moitie*, 452 U.S. 394 (1981), upon which the defendants also rely, is a *res judicata* case. There the plaintiffs had already lost in federal court and subsequently filed an "artfully plead" state court complaint. *Moitie* is not relevant because *res judicata* is not a defense in this case. Carlson has conceded that his "claim under the federal antitrust laws is [ ] clearly foreclosed by Supreme Court precedent . . . ." (Memorandum at 1). Accordingly, if this Court were to retain jurisdiction, dismissal would be on the merits, not because of the doctrine of *res judicata*.

As mentioned above, the only cases squarely on point are *Wiring Device* and *Mechanical Rubber*.[5] In those cases, the respective courts denied the motions to remand after considering the merits of the state antitrust claims. "[S]ince South Carolina has itself limited the application of its state antitrust statutes to intrastate commerce, the true nature of plaintiff's complaint is federal." *Wiring Device* at 83. "[T]his Court believes that Illinois courts would not extend the application of its antitrust law so that it would burden interstate commerce." *Mechanical Rubber* at 1296.[6] This Court declines to follow these cases for the following reasons. First, such a ruling gives short shrift to the oft-stated principle that the plaintiff is "master of the claim." If it is such a matter of settled law that Carlson's state claims are without merit, not only will

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America Corp. 490 U.S. 93 (1989).

[5] In *Free v. Abbott Laboratories, et al.*, 93-971-A (April 5, 1994), the identical issue was decided by The Honorable John V. Parker, Chief Judge for the Middle District of Louisiana, in accord with this Court's decision. (See attachment to Carlson's Memorandum).

[6] The Honorable John F. Grady of the Northern District of Illinois recently rejected as unwise the "broad rule" of *Mechanical Rubber*. *Corporate Travel Consultants, Inc. v. United Airlines, Inc.*, 799 F.Supp. 58, 60 (N.D.Ill. 1992).

dismissal be a swift and relatively simple matter, but Carlson risks being sanctioned under Wis. Stat. 802.05.[7] However, if dismissal is not so certain, this Court's retention of jurisdiction would improperly preclude Carlson from having the claim of his choice heard in the court of his choice. Second, assuming for the moment that the weight of Wisconsin authority is indeed contrary to Carlson's claim, retention of jurisdiction improperly precludes him from presenting to the state court compelling reasons for the reversal of that authority. Therefore, the merits of Carlson's claims should be heard by a Wisconsin court. Further, comity and a recognition of the federal judiciary's limited role, preclude the exercise of jurisdiction over these claims solely because they might be dismissed by a state court.

Lastly, even if Carlson's claims may be summarily dismissed in state court, they are not automatically transformed into federal claims for purposes of 28 U.S.C. §§ 1331 and 1441. As previously indicated, Carlson has no claim under the federal antitrust laws. Accordingly, Carlson's motion to remand Case No. 94-C-378 to the Circuit Court for Milwaukee County is granted.

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[7] This section, the equivalent to Fed. R. Civ. P. 11, provides for an award of sanctions if a pleading is "not well-grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law."

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

Plaintiff Richard R. Carlson's motion to remand is **GRANTED** and Case No. 94-C-378 is hereby **REMANDED** to the Circuit Court of Milwaukee County.

Dated at Milwaukee, Wisconsin, this 21st day of July, 1994.

SO ORDERED,

/s/ Rudolph T. Randa
HON. RUDOLPH T. RANDA
U.S. District Judge

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

LISA HEILMAN AND MARYLOU LEINTZ, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED WITHIN THE STATE OF NORTH DAKOTA

Plaintiffs,

v.

ABBOTT LABORATORIES, INC., BRISTOL-MYERS SQUIBB CO., AND MEAD JOHNSON & CO.,

Defendants.

A1-94-122

MEMORANDUM AND ORDER

Defendants removed this case from State Court on the basis of diversity and on the claim that the complaint sets out an antitrust cause having validity only under Federal statutes.

Plaintiffs counter by pointing out that the complaint specifically seeks only state law remedy, if any there be, and that the amount in controversy does not exceed $50,000.00 and the diversity jurisdiction predicate is not met.

The memorandum opinion of United States District Judge Leon Jordan in the identical Tennessee case analyzing the merits of the matter is a well reasoned presentation. At first blush this case appears to be a prime example leading to the feeling of many legislators for the need for tort reform. It

appears to have been initially sued out in Federal Court as a class action, compromised and settled, (with, the court suspects, the law firms benefitting greatly and the class members in minuscule amounts). Once settled in Federal Court, plaintiffs proceeded to file in State Courts, seeking class certification. Defendants seek to remove into Federal Court, where one assumes a motion to dismiss will be made on a *res adjudicata* theory.

Plaintiffs seek remand to State Court, pointing with glee to the carefully crafted pleading which would appear to make removal not appropriate. I agree with Judge Jordan. If the plaintiffs say that they raise no Federal issue nor the dollar threshold for diversity, then remand is proper. If there is no state law upon which the plaintiffs can premise a cause of action, as defendants allege, then the very competent state court jurists can determine and will grant an appropriate motion for dismissal.

Plaintiff's motion for remand is granted. (11)

SO ORDERED

Dated this 17th day of April, 1995

/s/ Patrick A. Conmy
Patrick A. Conmy, District Judge
United States District Court

IN THE
UNITED STATES DISTRICT COURT
DISTRICT MASSACHUSETTS

APRIL BOOS

Plaintiff.

v.

ABBOTT LABORATORIES, INC, ET AL.,

Defendants.

August 18, 1995
Civil Action No. 95-10091-NG

ORDER

COHEN, M.J.

Plaintiff's Motion to Remand (# 03) was referred to this court for disposition. See Docket Entry # 10.[1] After hearing, Plaintiff's Motion to Remand (# 03) is denied for the reasons set forth more fully below.

A. RELEVANT FACTS

Plaintiff April Boos (hereinafter "Boos") originally brought this action in Suffolk Superior Court in both her individual and representative capacities on behalf of the

[1] This court has the power to rule and enter a final order on a motion to remand, inasmuch as allowing or denying a motion to remand is a non-case-dispositive matter within the meaning of Section 636((b)(1)(A) of Title 28. *See In Re Foster*, 52 F.2d 343 (Fed. Cir. 1995) (Table Disposition—Text Available on LEXIS and WESTLAW).

plaintiff class. She alleges that defendants Abbott Laboratories, Inc., Bristol-Meyers Squibb Co., Mead Johnson & Co. and American Home Products Corp. (hereinafter referred to collectively as "defendants") engaged in unfair or deceptive methods of competition in violation of Massachusetts General Laws, Chapter 93A, Section 2, and engaged in restraint of trade in violation of Massachusetts *common law*.

On January 13, 1995, defendants filed a Notice of Removal to this Court pursuant to 28 U.S.C. Sections 1441 and 1446, asserting jurisdiction under Sections 1331 (federal question)[2] and 1332 (diversity). On February 10, Boos filed her Plaintiff's Motion to Remand (# 03) the case to state court under 28 U.S.C. 1447(c). Boos contends that neither federal question jurisdiction nor diversity jurisdiction had been established by defendants.

B. DIVERSITY JURISDICTION

In filing her motion to remand, plaintiff essentially contends that—no one single claim for relief urged by plaintiff, as representative of the class which she seeks to represent, and/or by individual members of the class—exceeds $50,000.[3] On account of this, she says that, for want of the appropriate amount in controversy, federal diversity jurisdiction is inappropriate under the rationale and holding set forth in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).[4]

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[2] Insofar as defendants sought removal on the basis of a federal question, defendants essentially alleged that plaintiff's common law restraint of trade count was, in realty, a claim invoking federal antitrust law.

[3] Insofar as defendants sought removal on the basis of diversity, defendants essentially alleged that, among other things, judgment in favor of the plaintiff would have a financial impact upon defendants in excess of $50,000 *and* that plaintiff's demand for attorney's fees under Chapter 93 clearly brought the jurisdictional amount above $50,000.

[4] Defendants do not challenge this factual assertion insofar as plaintiff (named and class members) seek monetary relief by the nature of the claims

Defendants, on the other hand, say that—notwithstanding the fact that neither plaintiff (nor any particular member of the putative classes seeks *compensable damages* in excess of $50,000—the amount in controversy element is satisfied for two reasons: First, plaintiff seeks, among other things, an award of attorneys' fees which, no doubt, will exceed $50,000;[5] and second, since plaintiff seeks a declaration that defendants' practices constitute "deceptive" and "unfair" practices within the meaning of c. 93A, the practical pecuniary impact on each of the defendants clearly exceeds $50,000.

1. AMOUNT IN CONTROVERSY INCLUDING ATTORNEY'S FEES

In her Complaint, plaintiff demands, among other things, reasonable attorney's fees under the provisions of c. 93A. Defendants contend, and plaintiff concedes, that if plaintiff is successful in her c. 93A claim, reasonable attorneys' fees will clearly exceed $50,000.

The generally accepted rule is that attorneys' fees may be included in an assessment of the amount in controversy for purposes of determining diversity jurisdiction when they are either permitted under a statute or provided for by contract. *Missouri State Life Insurance Co. v. Jones*, 290 U.S. 199, 202, 54 S.Ct. 133, 78 L.Ed. 267 (1933); *Velez v. Crown Life Ins. Co.*, 599 F.2d 471 (1st Cir. 1979); *Department of Recreation v. World Boxing Ass'n*, 942 F. 2d 84, 89-90 (lst Cir. 1991); 1 Moore's Federal Practice ¶ 0.99[2] (2d ed. 1985).

Plaintiff contends, however, relying specifically upon a 1982 holding in *Goldberg v. CPC Intern, Inc.*, 678 F.2d 1365, 1367 (9th Cir.), *cert. denied*, 459 U.S. 945 (1982), that since

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set forth in the complaint. No individual plaintiff or member of the plaintiff class would receive monetary relief—that is, compensable damages—even approaching $50,000.

[5] Plaintiff does not gainsay the position of the defendants that attorney's fees, if recoverable, will exceed $50,000.

plaintiff's complaint contains class allegations, consideration of attorneys' fees in determining the amount in controversy offends the holding and rationale of *Zahn, supra*.[6]

In this court's view, however, the *Goldberg* court, and others which have echoed similar conclusions, are wrong on two counts.

(a) *First*, in suggesting that looking to attorneys' fees in determining the amount in controversy was contrary to the rationale of *Zahn*, that Court seemed to believe that that exercise required an "aggregation" of class claims.[7] But it does

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[6] There that Court observed—

> CPC tries to avoid Zahn's implications by arguing, correctly, that attorney's fees can be taken into account in determining the amount in controversy if a statute authorizes fees to a successful litigant. *Missouri State Life Insurance Co. v. Jones*, 290 U.S. 199, 202, 54 S. Ct. 133, 78 L. Ed. 267 (1933); *Stokes v. Reeves*, 245 F.2d 700, 702 (9th Cir. 1957). Cal. Bus. & Prof.Code § 16750(a) authorizes attorneys' fees.
>
> CPC next contends that the potential attorneys' fees should be attributed to the named plaintiffs only, rather than pro rata to each class member, or, in the alternative, that the potential fees should be attributed to the class as a whole and treated as a common fund. Thus the amount in controversy requirement would be met because either the named plaintiffs will each meet the jurisdictional amount, or the entire class will.
>
> We find that acceptance of either of CPC's theories would conflict with the policy of *Zahn v. International Paper Co.*, in which the Supreme Court reaffirmed that the "matter in controversy" requirement must be satisfied by each member of the plaintiff class. Plaintiffs whose claims fall short cannot satisfy the requirement by aggregation of claims. CPC's theories would seriously undermine and are contrary to the rule expressed by the Supreme Court in *Zahn*. Thus we conclude that the potential attorneys' fees do not satisfy the jurisdictional amount for this cause of action, and that there is, therefore, no federal jurisdiction.

[7] "Plaintiffs whose claims fall short cannot satisfy the requirement by aggregation of claims." *Id.* at 1367.

not appear that was the case there, and it certainly is not the case here.

In a more recent decision discussing the role of attorney's fees in determining the amount in controversy within the context of a complaint containing class allegations, the Fifth Circuit has observed (*Free v. Abbott Laboratories*, 51 F.2d 524 (5th Cir. 1995))—

> The court found it had diversity jurisdiction over the *named* plaintiffs' claims even though each named and unnamed plaintiff claimed only $20,000, less than the $50,000 minimum for diversity jurisdiction. 28 U.S.C. § 1332(a). The district court found that Louisiana law attributed all of a class's attorney's fees to the named plaintiffs. It held that the claim of the named plaintiffs for $20,000—once swelled by attorney's fees—met the $50,000 amount-in-controversy requirement.
>
> Plaintiffs argue that Louisiana statutes distribute the fees pro rata to all members of the class, with the result that none meets the amount-in-controversy requirement.

The distribution of attorney's fees centers on two Louisiana statutes. The first, Article 595 of the Louisiana Code of Civil Procedure, provides:

> The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class . . .
>
> * * *
>
> Official Revision Comments
>
> (a) It is intended, in the first paragraph, that the reasonable expenses of litigation allowed the successful representative parties is to be paid out of the fund or benefits made available by their efforts.

The second key Louisiana statute is Section 51:137 of the Louisiana Revised Statutes, which provides:

> Any person who is injured in his business or property by any person by reason of any act or thing forbidden by this Part may sue in any court of competent jurisdiction and shall recover threefold the damages sustained by him, the cost of suit, and a reasonable attorney's fee.

Article 595, plaintiffs contend, supports their argument that the fees are to be distributed among all class members. See, *e.g.*, *White v. Board of Trustees*, 276 So. 2d 714, 719 (La. Ct. App.) (deducting pro rata shares of an Article 595 attorney's fee from the awards due to each plaintiff), writ ref'd, 279 So. 2d 694 (La. 1973).

We disagree. Defendants pay attorney's fees and damages. The plain text of the first sentence of 595 awards the fees to the "representative parties". (The language allowing the "representative parties" their fees is echoed in Comment (a).)

Finally, plaintiffs argue that construing Article 595 to attribute the fees to the named plaintiffs—rather than to distribute them among all the plaintiffs—renders the statute unconstitutional. The argument continues that the federal courts have generally held that Zahn forbids attributing the fees of class members to class representatives. The only circuit court to speak to this question held that attributing a class's attorney's fees only to the named plaintiffs instead of pro rata to each member of the class "would conflict with the policy of Zahn." *Goldberg v. CPC Int'l. Inc.*, 678 F.2d 1365, 1367 (9th Cir.), *cert. denied*, 459 U.S. 945, 74 L. Ed. 2d 202, 103 S. Ct. 259 (1982). Many district courts have followed Goldberg. But Goldberg's reading of Zahn sheds little light on the distinct policy choices behind Louisiana's decision regarding rights of recovery by class members. That a state

> chooses a set of rules that result in an award in excess of $50,000 frustrates no policy of Zahn. Simply put, under the law of Louisiana the class representatives were entitled to fees. Their rights of recovery were not created by a judge's summing the discrete rights of class members. The district court applied the law of Louisiana. Because it did so, we are persuaded that the individual claims of the class representatives met the requisite jurisdictional amount. (Emphasis added.)

This case is clearly controlled by *Free*, and permitting the claim to proceed in this court against the *named* plaintiff does no violence whatsoever to *Zahn*.

In this case, plaintiff demands attorney's fees under the provisions of c. 93A, § 9(4). That statute, not at all unlike the Louisiana statute referred to in *Free*, awards attorney's fees (upon the successful prosecution of a c. 93A claim) to the *named* party plaintiff. That statute provides, in pertinent part:

> (4) If the court finds in any civil action *commenced* hereunder that there has been a violation of section two, the *petitioner* shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorney's fees . . . . (Emphasis added.)

In this case, it is clear that "aggregation" is not required to make out attorney's fees in excess of $50,000. At the hearing before this court, counsel for plaintiff conceded that to fairly prosecute the claims set forth in the complaint, wholly apart from attorney's fees which could be fairly associated with class matters, attorney's fees would exceed $50,000. That is to say, even if this case was brought as a single plaintiff case *sans* class allegations, the attorney's fees would be essentially the same,[8] and certainly in excess of $50,000. To say, as plaintiff

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[8] Excepting minor additional attorney's fees relating solely to the establishment of class matters.

seemingly says, that the rule of *Zahn* requires that—in circumstances such as those presented here—attorney's fees be totally disregarded if a named plaintiff's claim is piggybacked with class allegations, is to turn *Zahn* into a jurisdictional sword rather than the jurisdictional shield intended. It cannot be gainsaid that, had plaintiff brought her claims against the defendants solely on her own behalf, removal jurisdiction on behest of the defendants was and is clearly warranted. *Zahn* cannot be fairly read to mean that a plaintiff may defeat that established right to removal simply by expediently penning class claims in a complaint.

(b) *Secondly*, in suggesting that looking to attorney's fees to make out the requisite amount in controversy ". . . would seriously undermine and are contrary to the rule expressed by the Supreme Court in *Zahn*[,]" and thus concluding that subject matter jurisdiction was wanting, the *Goldberg* court misconstrued the actual *holding*—not to mention the supporting rationale—in *Zahn*.

In *Zahn*, a number of *named* plaintiffs, on behalf of themselves and a class which they sought to represent, filed a common law nuisance case against the defendant in the district court. The claims of each of the *named* plaintiffs exceeded the jurisdictional amount required by 28 U.S.C. § 1332.[9] None of the claims of the *class* members could have exceeded that jurisdictional amount. Plaintiffs in that case invoked subject matter jurisdiction on the grounds of diversity. Inasmuch as the claims of the named plaintiffs exceeded the jurisdictional amount, the district judge concluded that subject matter existed as to those claims brought against the defendant. But inasmuch as the claims of the *class* members did not exceed the jurisdictional amount, the district judge declined to certify the class—concluding that the *class* members could not aggregate their respective individual claims to satisfy the jurisdictional

[9] At that time, the jurisdictional amount required was $10,000. Since then, of course, it has been increased to $50.000.

amount. On a petition for certiorari, the Supreme Court affirmed the decision of the district court—rejecting the assertion of petitioners in that case that the district court could assume "ancillary" jurisdiction over the claims of the *class* members.

The actual holding therefore was *not*, as suggested by the *Goldberg* court, that subject matter jurisdiction was lacking for the entire case, but *only* as to the claims of the putative class members whose claims did not (individually) exceed the jurisdictional amount. It bears repeating that, notwithstanding the conclusion by the district judge in *Zahn* that none of the putative *class* members' claims would exceed the jurisdictional amount, the district judge nevertheless *retained* jurisdiction over the claims of the *named* plaintiffs against the defendants, and *dismissed* the class claims, and the class claims only, for want of subject matter jurisdiction.

(c) In these circumstances, it is clear here—as it was in *Free*, *supra*[10]—that the *named* plaintiff's entitlement to attorney's fees in excess of $50,000 satisfies the amount in controversy element of diversity jurisdiction,[11] and that so holding does not do violence to either the letter or spirit of the

[10] On another matter not dealing exclusively with the attorney fee calculation as used in the amount in controversy calculi, the *Free* court discussed the effect of the Judicial Improvements Act of 1990, 28 U.S.C. Section 1367. Defendants seemingly urge that that Act overrules the holding in *Zahn*, and, not surprisingly, plaintiff urges that it did not— relying on the authority, among others, of *Mayo v. Key Financial Services, Inc.*, 812 F. Supp. 277 (D.Mass. 1993).

Because of this court's disposition of the matter as set forth in the text herein, there is no occasion to enter that thorny thicket except to say that, given this court's disposition herein, the tables may well be turned in later proceedings; that is, it might well be *plaintiff* who would contend that that Act overruled the holding in *Zahn*, and defendants who contend that it does not. See note 16, p. 9, below.

[11] Plaintiff does not suggest that the other required elements of diversity jurisdiction are lacking.

holding in *Zahn*; indeed, so holding in this case is clearly consistent with the actual holding in *Zahn*.

2. AMOUNT IN CONTROVERSY INCLUDING FINANCIAL IMPACT ON DEFENDANTS

Under settled law, in a case in which the complainant, in addition to seeking compensatory damages, also seeks a declaration of rights, it is appropriate to assess the amount in controversy by looking to the consequences of that declaration to a defendant. *E.g.*, *Beacon Construction Co. v. Matco Electric Co.*, 521 F.2d 392, 399 (2d Cir. 1975) (considering both damages and value of declaratory judgment, because "the amount in controversy is not necessarily the money judgment sought or recovered, but rather *the value of the consequences which may result from the litigation*") (emphasis added), *citing Smith v. Adams*, 130 U.S. 167, 175 (1889). *Work v. U.S. Trade, Inc.*, 747 F. Supp. 1184 (E.D.Va. 1990) (considering declaratory judgment claim together with $45,000 damages claim to satisfy $50,000 amount in controversy requirement);[12]

[12] Albeit in *dicta*, our Court of Appeals has, at least on three occasions, indicated that it was prepared to measure the amount in controversy—in cases in which injunctive or declaratory relief was sought—by the value of the consequences which may result from the litigation. *See e.g.*, *Williams v. Kleppe*, 539 F.2d 803, 804-05 n.1 (1st Cir. 1976) (". . . more realistically, we can rely on the extent of the claimed pecuniary bunden on defendants were plaintiffs to prevail."); *Commonwealth of Massachusetts v. United States Veterans Ass'n*, 541 F.2d 119, 122 n. 3 (1st Cir. 1976) ("Since the pecuniary burden on the VA would probably be in excess of $10,000 should the Commonwealth prevail, we think that the jurisdictional amount requirement is satisfied"); *Berman v. Narragansett Racing Ass'n*, 414 F.2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970).

Plaintiff suggests that other holdings in this district are to the contrary, citing, primarily, *Hairston v. Home Loan and Investment Bank*, 814 F.Supp. 180, 182 (D.Mass. 1993). In that case, however, the district judge (Tauro, C.J.) did *not* reject the notion that the amount in controversy could and should be measured in terms of the consequences which might result from the litigation. To the contrary, accepting that position, the district judge simply concluded that, in the circumstances of that particular case, he could not fairly conclude that the economic value of those "consequences" would exceed $50,000.

14A Wright, Miller & Cooper, Federal Practice & Procedure §3725, pp. 431-32 (1985).[13] In assessing the consequences of a declaration of rights, it is appropriate to look at, among other things, the ". . . . possibility of detrimental effect on sales and loss of goodwill" by party seeking diversity jurisdiction. *See McCain Foods Ltd. v. Puerto Rico Supplies, Inc.*, 766 F. Supp. 58, 60 (D.P.R. 1991).

In this case, it would blink reality to assume that the declaratory relief which plaintiff seeks would have a financial impact on each of the named defendants of less than $50,000. Among other things, plaintiff alleges that the defendants, and each of them, engaged in "unfair and deceptive practices" for more than twelve years, "grossly overcharg[ing]" consumers in Massachusetts "millions of dollars." At bottom, plaintiff alleges that the defendants, and each of them, engaged in price gouging and price fixing—the latter a criminal offense. *See* 15 U. S. C. § 1.[14]

It is thus clear that, inasmuch as plaintiff seeks, among other things, a declaration that the defendants have engaged in "unfair and deceptive practices" for the last twelve years, more or less, in violation of the provisions of Chapter 93A, the real stakes, the real amount in controversy, for the defendants, indeed, each of the defendants, clearly exceeds $50,000.

C. DISPOSITION

For the reasons stated above, this court finds and concludes that the *named* plaintiff's claims against each of the defendants

[13] The authors deem a "defendant's viewpoint" approach when declaratory or injunctive relief is sought the "most desirable method of computation . . .". *Id.* at 432.

[14] A felony, punishable by a fine (for corporations) not exceeding $10 million.

satisfies the amount in controversy provisions of 28 U.S.C. § 1332, and that, therefore, the case was properly removed to this court.[15] Accordingly, insofar as plaintiff seeks to remand the named plaintiff's claims to the state court, that motion is denied.[16]

/s/ Laurence P. Cohen
UNITED STATES MAGISTRATE JUDGE

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[15] Inasmuch as this court finds that diversity jurisdiction exists, there is no occasion to address the other grounds asserted by defendants for removal jurisdiction, save to say that, insofar as plaintiff, in Count 2, alleges *common law* restraint of trade, it appears that the "artful pleading" doctrine referred to in defendants' oppositions to the motion to remand might well apply if plaintiff, in making out a case of so-called common law restraint of trade, asks the court to interpret the common law consistent with the holdings in cases interpreting the federal antitrust acts.

[16] This disposition, of course, leaves plaintiff's class allegations in a state of limbo. But that is not an anomaly— it was precisely the same case as *Zahn*, the main authority upon which plaintiff relies.

As indicated above, Section 1.(b), p. 8, the district court, in *Zahn*, did *not* dismiss the case for want of subject matter jurisdiction. Instead, it *retained* jurisdiction over the claims of the *named* plaintiffs *vis a vis* the defendants, and *dismissed* the class claims. And that holding was left undisturbed by the United States Court of Appeals for the Second Circuit and the Supreme Court of the United States.

At the present time, of course, the only matter before this court is plaintiff's motion to remand. The validity—the viability—of the class claims is not a matter before this court, and it is one which must be left for another day—a day, perhaps, when, as indicated elsewhere, n. 10, p. 9, above, the parties may engage in a role reversal *vis a vis* their respective positions as to the meaning of the Judicial Improvements Act of 1990, 28 U.S.C. Section 1367.

106TH CONGRESS
1ST SESSION **H.R. 1875**

AN ACT

To amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND REFERENCE.

(a) SHORT TITLE - This Act may be cited as the 'Interstate Class Action Jurisdiction Act of 1999'.

(b) REFERENCE - Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

SECTION 2. FINDINGS.

The Congress finds that—

(1) as recently noted by the United States Court of Appeals for the Third Circuit, interstate class actions are 'the paradigm for Federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, invite discrimination by a local State, and tend to attract bias against business enterprises';

(2) most such cases, however, fall outside the scope of current Federal diversity jurisdiction statutes;

(3) that exclusion is an unintended technicality, inasmuch as those statutes were enacted by Congress before the rise of the modern class action and therefore without recognition that interstate class actions typically are substantial controversies of the type for which diversity jurisdiction was designed;

(4) Congress is constitutionally empowered to amend the current Federal diversity jurisdiction statutes to permit most interstate class actions to be brought in or removed to Federal district courts; and

(5) in order to ensure that interstate class actions are adjudicated in a fair, consistent, and efficient manner and to correct the unintended, technical exclusion of such cases from the scope of Federal diversity jurisdiction, it is appropriate for Congress to amend the Federal diversity jurisdiction and related statutes to allow more interstate class actions to be brought in or removed to Federal court.

SECTION 3. JURISDICTION OF DISTRICT COURTS.

(a) EXPANSION OF FEDERAL JURISDICTION- Section 1332 ((28 USCA 1332)) is amended by redesignating subsections (b), (c), and (d) as subsections (c), (d), and (e), respectively, and by inserting after subsection (a) the following:

"(b) (1) The district courts shall have original jurisdiction of any civil action which is brought as a class action and in which—

"(A) any member of a proposed plaintiff class is a citizen of a State different from any defendant;

"(B) any member of a proposed plaintiff class is a foreign state and any defendant is a citizen of a State; or

"(C) any member of a proposed plaintiff class is a citizen of a State and any defendant is a citizen or subject of a foreign state.

As used in this paragraph, the term 'foreign state' has the meaning given that term in section 1603(a) ((28 USCA 1603)).

"(2) (A) The district courts shall not exercise jurisdiction over a civil action described in paragraph (1) if the action is—

"(i) an intrastate case;

"(ii) a limited scope case; or

"(iii) a State action case.

"(B) For purposes of subparagraph (A)—

"(i) the term 'intrastate case' means a class action in which the record indicates that—

"(I) the claims asserted therein will be governed primarily by the laws of the State in which the action was originally filed; and

"(II) the substantial majority of the members of all proposed plaintiff classes, and the primary defendants, are citizens of the State in which the action was originally filed;

"(ii) the term limited scope case, means a class action in which the record indicates that all matters in controversy, asserted by all members of all proposed plaintiff classes do not in the aggregate exceed the sum or value of $1,000,000, exclusive of interest and costs, or a class action in which the number of members of all proposed plaintiff classes in the aggregate is less than 100; and

"(iii) the term 'State action case' means a class action in which the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

"(3) Paragraph (1) shall not apply to any claim concerning a covered security as that term is defined in section 16(f)(3) of the Securities Act of 1933 ((15 USCA 77p)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 ((15 USCA 78bb)).

"(4) Paragraph (1) shall not apply to any class action solely involving a claim that relates to—

"(A) the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(B) the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 ((15 USCA 77b)) and the regulations issued thereunder).".

(b) CONFORMING AMENDMENT- Section 1332(c) ((28 USCA 1332)) (as redesignated by this section) is amended by inserting after 'Federal courts' the following: 'pursuant to subsection (a) of this section'.

(c) DETERMINATION OF DIVERSITY- Section 1332 ((28 USCA 1332)), as amended by this section, is further amended by adding at the end the following:

"(f) For purposes of subsection (b), a member of a proposed class shall be deemed to be a citizen of a State different from a defendant corporation only if that member is

a citizen of a State different from all States of which the defendant corporation is deemed a citizen.".

SECTION 4. REMOVAL OF CLASS ACTIONS.

(a) IN GENERAL - Chapter 89 [FN1] is amended by adding after section 1452 ((28 USCA 1452)) the following:

"Sec. 1453. Removal of class actions

"(a) IN GENERAL - A class action may be removed to a district court of the United States in accordance with this chapter, but without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed—

"(1) by any defendant without the consent of all defendants; or

"(2) by any plaintiff class member who is not a named or representative class member of the action for which removal is sought, without the consent of all members of such class.

"(b) WHEN REMOVABLE - This section shall apply to any class action before or after the entry of any order certifying a class, except that a plaintiff class member who is not a named or representative class member of the action may not seek removal of the action before an order certifying a class of which the plaintiff is a class member has been entered.

"(c) PROCEDURE FOR REMOVAL - The provisions of section 1446(a) ((28 USCA 1446)) relating to a defendant removing a case shall apply to a plaintiff removing a case under this section. With respect to the application of subsection (b) of such section, the requirement relating to the 30-day filing period shall be met if a plaintiff class member who is not a named or

representative class member of the action for which removal is sought files notice of removal no later than 30 days after receipt by such class member, through service or otherwise, of the initial written notice of the class action provided at the court's direction.

"(d) EXCEPTIONS—

"(1) COVERED SECURITIES - This section shall not apply to any claim concerning a covered security as that term is defined in section 16(f)(3) of the Securities Act of 1933 ((15 USCA 77p)) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 ((15 USCA 78bb)).

"(2) INTERNAL GOVERNANCE OF BUSINESS ENTITIES - This section shall not apply to any class action solely involving a claim that relates to—

"(A) the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

"(B) the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 ((15 USCA 77b)) and the regulations issued thereunder).".

(b) REMOVAL LIMITATIONS - Section 1446(b) ((28 USCA 1446)) is amended in the second sentence—

(1) by inserting ', by exercising due diligence' after 'ascertained'; and

(2) by inserting '(A)' after 'section 1332'.

(c) TECHNICAL AND CONFORMING AMENDMENTS - The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

"1453. Removal of class actions.".

(d) APPLICATION OF SUBSTANTIVE STATE LAW - Nothing in this section or the amendments made by this section shall alter the substantive law applicable to an action to which the amendments made by section 3 of this Act apply.

(e) PROCEDURE AFTER REMOVAL - Section 1447 ((28 USCA 1447)) is amended by adding at the end the following new subsection:

"(f) If, after removal, the court determines that no aspect of an action that is subject to its jurisdiction solely under the provisions of section 1332(b) ((28 USCA 1332)) may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, it shall dismiss the action. An action dismissed pursuant to this subsection may be amended and filed again in a State court, but any such refiled action may be removed again if it is an action of which the district courts of the United States have original jurisdiction. In any action that is dismissed pursuant to this subsection and that is refiled by any of the named plaintiffs therein in the same State court venue in which the dismissed action was originally filed, the limitations periods on all reasserted claims shall be deemed tolled for the period during which the dismissed class action was pending. The limitations periods on any claims that were asserted in a class action dismissed pursuant to this subsection that are subsequently asserted in an individual action shall be deemed tolled for the period during which the dismissed class action was pending.".

SECTION 5. APPLICABILITY.

The amendments made by this Act shall apply to any action commenced on or after the date of the enactment of this Act.

SECTION 6. GAO STUDY.

The Comptroller General of the United States shall, by not later than 1 year after the date of the enactment of this Act, conduct a study of the impact of the amendments made by this Act on the workload of the Federal courts and report to the Congress on the results of the study.

Passed the House of Representatives September 23, 1999.

Attest:

Clerk

106TH CONGRESS
1ST SESSION

S. 353

To provide for class action reform, and for other purposes.

IN THE SENATE OF THE UNITED STATES

February 3, 1999

Mr. GRASSLEY (for himself, Mr. KOHL, and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for class action reform, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Class Action Fairness Act of 1999".

SEC. 2. NOTIFICATION REQUIREMENT OF CLASS ACTION CERTIFICATION OR SETTLEMENT.

(a) IN GENERAL - Part V of title 28, United States Code, is amended by inserting after chapter 113 the following new chapter:

"CHAPTER 114—CLASS ACTIONS

"Sec.

"1711. Definitions.

"1712. Application.

"1713. Notification of class action certifications and settlements.

"1714. Limitation on attorney's fees in class actions.

"Sec. 1711. Definitions

"In this chapter the term—

"(1) 'class' means a group of persons that comprise parties to a civil action brought by 1 or more representative persons;

"(2) 'class action' means a civil action filed pursuant to rule 23 of the Federal Rules of Civil Procedure or similar State rules of procedure authorizing an action to be brought by 1 or more representative persons on behalf of a class;

"(3) 'class certification order' means an order issued by a court approving the treatment of a civil action as a class action;

"(4) 'class member' means a person that falls within the definition of the class;

"(5) 'class counsel' means the attorneys representing the class in a class action;

"(6) 'Plaintiff class action' means a class action in which class members are plaintiffs; and

"(7) 'proposed settlement' means a settlement agreement between or among the parties in a class action that is subject to court approval before the settlement becomes binding on the parties.

"Sec. 1712. Application

"This chapter shall apply to—

"(1) all plaintiff class actions filed in Federal court; and

"(2) all plaintiff class actions filed in State court in which—

"(A) any class member resides outside the State in which the action is filed; and

"(B) the transaction or occurrence that gave rise to the class action occurred in more than 1 State.

"Sec. 1713. Notification of class action certifications and settlements

"(a) Not later than 10 days after a proposed settlement in a class action is filed in court, class counsel shall serve the State attorney general of each State in which a class member resides and the Attorney General of the United States as if such attorneys general and the Department of Justice were parties in the class action with—

"(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

"(2) notice of any scheduled judicial hearing in the class action;

"(3) any proposed or final notification to class members of—

"(A)(i) the members' rights to request exclusion from the class action; or

"(ii) if no right to request exclusion exists, a statement that no such right exists; and

"(B) a proposed settlement of a class action;

"(4) any proposed or final class action settlement;

"(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

"(6) any final judgment or notice of dismissal;

"(7)(A) if feasible the names of class members who reside in each State attorney general's respective State and

the estimated proportionate claim of such members to the entire settlement; or

"(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each attorney general's State and the estimated proportionate claim of such members to the entire settlement; and

"(8) any written judicial opinion relating to the materials described under paragraphs (3) through (6).

"(b) A hearing to consider final approval of a proposed settlement may not be held earlier than 120 days after the date on which the State attorneys general and the Attorney General of the United States are served notice under subsection (a).

"(c) Any court with jurisdiction over a plaintiff class action shall require that—

"(1) any written notice provided to the class through the mail or publication in printed media contain a short summary written in plain, easily understood language, describing—

"(A) the subject matter of the class action;

"(B) the legal consequences of being a member of the class action;

"(C) the ability of a class member to seek removal of the class action to Federal court if—

"(i) the action is filed in a State court; and

"(ii) Federal jurisdiction would apply to such action under section 1332(d);

"(D) if the notice is informing class members of a proposed settlement agreement—

"(i) the benefits that will accrue to the class due to the settlement;

"(ii) the rights that class members will lose or waive through the settlement;

"(iii) obligations that will be imposed on the defen"dants by the settlement;

"(iv) the dollar amount of any attorney's fee class counsel will be seeking, or if not possible, a good faith estimate of the dollar amount of any attorney's fee class counsel will be seeking; and

"(v) an explanation of how any attorney's fee will be calculated and funded; and

"(E) any other material matter; and

"(2) any notice provided through television or radio to inform the class members of the right of each member to be excluded from a class action or a proposed settlement, if such right exists, shall, in plain, easily understood language—

"(A) describe the persons who may potentially become class members in the class action; and

"(B) explain that the failure of a person falling within the definition of the class to exercise such person's right to be excluded from a class action will result in the person's inclusion in the class action.

"(d) Compliance with this section shall not provide immunity to any party from any legal action under Federal or State law, including actions for malpractice or fraud.

"(e)(1) A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member resides in a State where the State attorney general has not been provided notice and materials under subsection (a).

"(2) The rights created by this subsection shall apply only to class members or any person acting on a class member's

behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

"(f) Nothing in this section shall be construed to impose any obligations, duties, or responsibilities upon State attorneys general or the Attorney General of the United States.

"Sec. 1714. Limitation on attorney's fees in class actions

"(a) In any class action, the total attorney's fees and expenses awarded by the court to counsel for the plaintiff class may not exceed a reasonable percentage of the amount of—

"(1) any damages and prejudgment interest actually paid to the class;

"(2) any future financial benefits to the class based on the cessation of alleged improper conduct by the defendants; and

"(3) costs actually incurred by all defendants in complying with the terms of an injunctive order or settlement agreement.

"(b) Notwithstanding subsection (a), to the extent that the law permits, the court may award attorney's fees and expenses to counsel for the plaintiff class based on a reasonable lodestar calculation.".

(b) TECHNICAL AND CONFORMING AMENDMENT - The table of chapters for part V of title 28, United States Code, is amended by inserting after the item relating to chapter 113 the following:

"114. Class Actions ..... 1711".

SEC. 3. DIVERSITY JURISDICTION FOR CLASS ACTIONS.

Section 1332 of title 28, United States Code, is amended—

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

"(d)(1) In this subsection, the terms 'class', 'class action', and 'class certification order' have the meanings given such terms under section 1711.

"(2) The district courts shall have original jurisdiction of any civil action where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is a class action in which—

"(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

"(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

"(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

"(3) The district court shall abstain from hearing a civil action described under paragraph (2) if—

"(A)(i) the substantial majority of the members of the proposed plaintiff class are citizens of a single State of which the primary defendants are also citizens; and

"(ii) the claims asserted will be governed primarily by the laws of that State; or

"(B) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

"(4) In any class action, the claims of the individual members of any class shall be aggregated to determine whether the matter in controversy

exceeds the sum or value of $75,000, exclusive of interest and costs.

"(5) This subsection shall apply to any class action before or after the entry of a class certification order by the court.

"(6)(A) A district court shall dismiss, or, if after removal, strike the class allegations and remand, any civil action if—

"(i) the action is subject to the jurisdiction of the court solely under this subsection; and

"(ii) the court determines the action may not proceed as a class action based on a failure to satisfy the conditions of rule 23 of the Federal Rules of Civil Procedure.

"(B) Nothing in subparagraph (A) shall prohibit plaintiffs from filing an amended class action in Federal or State court.

"(C) Upon dismissal or remand, the period of limitations for any claim that was asserted in an action on behalf of any named or unnamed member of any proposed class shall be deemed tolled to the full extent provided under Federal law.

"(7) Paragraph (2) shall not apply to any class action, regardless of which forum any such action may be filed in, involving any claim relating to—

"(A) the internal affairs or governance of a corporation or other form of entity or business association arising under or by virtue of the statutory, common, or other laws of the State in which such corporation, entity, or business association is incorporated (in the case of a corporation) or organized (in the case of any other entity); or

"(B) the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) ((15 USCA 77b)) of the Securities Act of 1933 or the rules and regulations adopted under such Act).".

SEC. 4. REMOVAL OF CLASS ACTIONS TO FEDERAL COURT.

(a) IN GENERAL- Chapter 89 of title 28, United States Code, is amended by adding after section 1452 ((28 USCA 1452)) [FNI] the following: "Sec. 1453. Removal of class actions

"(a) In this section, the terms 'class', 'class action', and 'class member' have the meanings given such terms under section 1711.

"(b) A class action may be removed to a district court of the United States in accordance with this chapter, except that such action may be removed—

"(1) by any defendant without the consent of all defendants; or

"(2) by any plaintiff class member who is not a named or representative class member without the consent of all members of such class.

"(c) This section shall apply to any class action before or after the entry of any order certifying a class.

"(d) The provisions of section 1446 ((28 USCA 1446)) relating to a defendant removing a case shall apply to a plaintiff removing a case under this section, except that in the application of subsection (b) of such section the requirement relating to the 30-day filing period shall be met if a plaintiff class member files notice of removal within 30 days after receipt by such class member, through

service or otherwise, of the initial written notice of the class action.

"(e) This section shall not apply to any class action, regardless of which forum any such action may be filed in, involving any claim relating to—

"(1) the internal affairs or governance of a corporation or other form of entity or business association arising under or by virtue of the statutory, common, or other laws of the State in which such corporation, entity, or business association is incorporated (in the case of a corporation) or organized (in the case of any other entity); or

"(2) the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) ((15 USCA 77b)) of the Securities Act of 1933 or the rules and regulations adopted under such Act).".

(b) REMOVAL LIMITATION - Section 1446(b) of title 28, United States Code, is amended in the second sentence by inserting "(a)" after "section 1332".

(c) TECHNICAL AND CONFORMING AMENDMENTS - The table of sections for chapter 89 of title 28, United States Code, is amended by adding after the item relating to section 1452 ((28 USCA 1452)) the following:

"1453. Removal of class actions.".

SEC. 5. REPRESENTATIONS AND SANCTIONS UNDER RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 11(c) of the Federal Rules of Civil Procedure is amended—

(1) in the first sentence by striking "may, subject to the conditions stated below," and inserting "shall";

(2) in paragraph (2) by striking the first and second sentences and inserting "A sanction imposed for violation of this rule may consist of reasonable attorneys' fees and other expenses incurred as a result of the violation, directives of a nonmonetary nature, or an order to pay penalty into court or to a party."; and

(3) in paragraph (2)(A) by inserting before the period ", although such sanctions may be awarded against a party's attorneys".

SEC. 6. EFFECTIVE DATE.

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.

(3)

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IN THE

Supreme Court of the United States

ROBIN FREE and RENEE FREE,

Petitioners,

v.

ABBOTT LABORATORIES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners Robin Free and Renee Free submit this reply brief in support of their Petition for a Writ of Certiorari.

INTRODUCTION

This Petition presents a two-two circuit split wherein the appellate courts expressly disagree whether the supplemental jurisdiction statute overrules or preserves this Court's requirement that each plaintiff or class member in a diversity case satisfy the jurisdictional minimum. Respondents deny neither the existence of this circuit split nor that a decision from this Court is necessary to end the continuing, protracted, and unproductive battles over a basic question of jurisdiction. Instead, Respondents only attempt to portray the Fifth Circuit's decision in this case ("*Abbott*") as presenting an unusual jurisdictional issue unworthy of the Court's attention. However, Respondents simply ignore the large number of cases demonstrating the frequency with which the lower federal courts face this issue.

I.

RESPONDENTS' ATTEMPT TO TRIVIALIZE THE RULE ADOPTED BY THE FIFTH AND SEVENTH CIRCUITS SIMPLY IGNORES NUMEROUS CASES AND STATUTES.

The Fifth and Seventh Circuits hold the supplemental jurisdiction statute, 28 U.S.C. § 1367, overrules *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), and therefore when the claims of one plaintiff satisfy the jurisdictional minimum of 28 U.S.C. § 1332 there is supplemental jurisdiction over the claims of all other plaintiffs or class members even if they cannot satisfy the jurisdictional minimum. *In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995); *In re Brand Name Prescription Drugs*, 123 F.3d 599 (7th Cir. 1997); *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930 (7th Cir. 1996). As common sense suggests, it is a frequent

occurrence that not every plaintiff or class member can satisfy the jurisdictional minimum. *Zahn* itself is an example of a case in which some plaintiffs or class members satisfied the jurisdictional minimum but others did not. The same situation occurred in *Allstate, Stromberg, Leonhardt v. Western Sugar Co.*, 160 F.3d 634, 640 (10th Cir. 1998), and *Meritcare, Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999), thus giving rise to the circuit split. It also occurred in numerous district court cases.[1]

1. *See, e.g., Allendale Mut. Life Ins. Co. v. Excess Ins. Co.*, No. 95 Civ. 10970 (SAS), 1999 WL 608788, at *9 (S.D.N.Y. Aug. 12, 1999) (non-class action in which some plaintiffs satisfied jurisdictional minimum and others did not); *City and County of San Francisco v. Hartford Life Ins. Co.*, No. C 99-0225 CRB ARB, 1999 WL 354522, at *5 (N.D. Cal. May 17, 1999) (non-class action in which a governmental plaintiff satisfied jurisdictional minimum but individual plaintiffs did not); *Casteel v. Sara Lee Corp.*, No. Civ. 99-40117, 1999 WL 382375, at *2 (E.D. Mich. June 7, 1999) (class action in which only some named plaintiffs and class members satisfied jurisdictional minimum); *Daniels v. Philip Morris Cos.*, 18 F. Supp. 2d 1110, 1115-16 (S.D. Cal. 1998) (class action in which some class members could not satisfy jurisdictional minimum); *Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. 808, 811 (E.D. Pa. 1997) (class action in which one named plaintiff satisfied jurisdictional minimum but other named plaintiffs and class members did not); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 60 (D. Mass. 1997) (class action in which named plaintiffs satisfied jurisdictional minimum but class members did not); *Leszczynski v. Allianz Ins.*, 176 F.R.D. 659, 666 (S.D. Fla. 1997) (class action in which named plaintiffs satisfied jurisdictional minimum but two groups of class members did not); *Howard v. Globe Life Ins. Co.*, 973 F. Supp. 1412, 1420 (N.D. Fla. 1996) (class action in which named plaintiffs satisfied jurisdictional minimum but class members did not); *McGowan v. Cadbury Schweppes, PLC*, 941 F. Supp. 344, 347-48 & n.3 (S.D.N.Y. 1996) (class action in which named plaintiffs had the right to all attorney fees under state (Cont'd)

Respondents attempt to evade this substantial body of case law by defining the issue so narrowly as to give the appearance

(Cont'd)
law); *Bernard v. Gerber Food Prods. Co.*, 938 F. Supp. 218, 223-24 (S.D.N.Y. 1996) (same); *Gilmer v. Walt Disney Co.*, 915 F. Supp. 1001, 1012 (W.D. Ark. 1996) ("we conclude that while, while the named plaintiff's actual damages are slight, it is more likely than not that if the plaintiff prevails the punitive damages award would exceed the jurisdictional amount"); *Snider v. Stimson Lumber Co.*, 914 F. Supp. 388, 389-92 (E.D. Cal. 1996) (class action complaint alleged that named plaintiffs satisfied jurisdictional minimum and defendants contended class members did not satisfy the minimum); *Waters v. Grosfeld*, 904 F. Supp. 616, 618 (E.D. Mich. 1995) (class action in which not all class members claimed $50,000 or more in damages); *Benfield v. Mocatta Metals Corp.*, No. 91 Civ. 8255, 1993 WL 148978, at *1, 4 (S.D.N.Y. May 5, 1993) (class action in which some class members did not satisfy jurisdictional minimum); *Hairston v. Home Loan and Inv. Bank*, 814 F. Supp. 180, 181 n.1 (D. Mass 1993) (class action in which three of four named plaintiffs and many class members did not satisfy jurisdictional minimum); *Mayo v. Key Fin. Serv., Inc.*, 812 F. Supp. 277, 278 (D. Mass. 1993) (class action in which only one named plaintiff satisfied jurisdictional minimum); *Averdick v. Republic Fin. Serv., Inc.*, 803 F. Supp. 37, 45-46 (E.D. Ky. 1992) (class action in which some class members did not satisfy jurisdictional minimum), *rev'd on other grounds*, *Page v. City of Southfield*, 45 F.3d 128, 132-33 (6th Cir. 1995).

In addition, several cases hold that if Section 1367 overrules *Zahn*, then the federal policy against aggregating attorney fees for jurisdictional purposes also would be overruled and therefore named plaintiffs but not class members would satisfy the jurisdictional minimum. *Kanter v. Warner-Lambert Co.*, No. C99-1154 FMS, 1999 WL 390839, at *4 (N.D. Cal. June 9, 1999); *Crosby v. America Online, Inc.*, 967 F. Supp. 257, 262-64 (N.D. Ohio 1997); *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 713 (C.D. Cal. 1995); *In re Potash Antitrust Litig.*, 866 F. Supp. 406, 412 n.10, 414 n.19 (D. Minn. 1994). Only because they concluded that *Zahn* remains good law have these courts averted what Respondents term "lumpiness."

that *Abbott* stands alone. However, each of Respondents' implicit narrowing criteria defies logic and experience.

First, Respondents treat as irrelevant all case law that reached a result different from *Abbott* and *Stromberg*. (Brief in Opp. at 11) ("Abbott is a singular *result*.") (emphasis added). According to Respondents' argument, the rule of *Abbott* and *Stromberg* presents no threat of expanding jurisdiction in diversity cases because two other appellate courts and the vast majority of district courts have disagreed with *Abbott* and *Stromberg*. However, this results-oriented approach is obviously unsound. The threat of expanding jurisdiction in diversity cases was present in each of the cases holding that Section 1367 does not overrule *Zahn*.[2] Moreover, that threat has become a reality for all of the district courts in the Fifth and Seventh Circuits, which are bound to follow their circuit court rulings, and it will continue to arise in other circuits. To the extent Respondents' argument is predicated on the existence *vel non* of reported cases in the Fifth and Seventh Circuits applying *Abbott* and *Stromberg*, one would not expect to find published cases regarding a settled issue.

Second, Respondents implicitly argue the issue is limited to class action cases. But this Court's interpretation of the

2. In the Petition for Certiorari, twenty district court cases were cited as examples of cases holding that Section 1367 does not overrule *Zahn*. (Pet. For Cert. at 13-14 n.1). Petitioners mistakenly included *Universal Jewelry & Watch Repair, Inc. v. United Parcel Service, Inc.*, No. 99-70016, 1999 U.S. Dist. LEXIS 5957 (E.D. Mich. April 12, 1999); *Blair v. Source One Mortgage Services Corp.*, 925 F. Supp. 617 (D. Minn. 1996); and *Shelly v. Southern Bell Telephone & Telegraph Co.*, 873 F. Supp. 613 (M.D. Ala. 1995); upon closer examination, it is clear that these cases ultimately decline to decide the issue. There is a plethora of additional cases holding that Section 1367 does not overrule *Zahn*. *See, e.g., In re Abbott Labs.*, 51 F.3d at 528 n.8 (citing cases); *Borgeson*, 909 F. Supp. at 715-16 & nn.11, 12 (same).

diversity statute's "matter in controversy" requirement is the same in class and non-class actions. Writing for the Seventh Circuit, Judge Easterbrook explained this in *Stromberg*, a non-class action:

> The Goldwyns ask us to distinguish *Abbott Laboratories* on the ground that it, like *Zahn*, involved a class action. *Zahn* held that every member of a class must satisfy the jurisdictional minimum, and *Abbott Laboratories* concluded that under § 1367 only the named class representatives need do so. Our case, by contrast, has just two plaintiffs. But § 1367 does not distinguish class actions from other cases; neither did *Zahn*. Indeed, the point of *Zahn* was that the class device made no difference. *Snyder v. Harris*, 394 U.S. 332, 89 S.CT. 1053, 22 L.Ed.2d 319 (1969), held that Fed.R.Civ.P. 23 does not alter the rule that multiple persons' claims cannot be combined to reach the minimum amount in controversy. Then *Zahn* added that each unnamed class member must satisfy the jurisdictional amount even if the class representatives do so without aggregation. The Court started from the proposition, established in *Clark*,[3] that § 1332 applies to each party independently. See also *Scott v. Frazier*, 253 U.S. 243 (1920). *Zahn* holds that the unnamed class members remain "parties" for this purpose. In modern terms, this means that Rule 23 does not authorize pendent-party jurisdiction. See also Fed.R.Civ.P. 82 ("[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts"). *Zahn* added only that the status of the pendent parties as class members (rather than as named representatives) does not make a difference.

3. *Clark v. Paul Gray*, 306 U.S. 583 (1939).

77 F.3d at 931. Accordingly, in a subsequent class action, *In re Brand Name Prescription Drugs*, the same court directly applied the holding of *Stromberg*. 123 F.3d at 607 (Posner, C.J.).

Third, Respondents ignore all cases decided before *Abbott* by framing their argument in terms of whether "a court has applied the *Abbott* ruling to find federal jurisdiction . . ." (Brief in Opp. at 6). Numerous cases decided before *Abbott* had to address the same issue that is presented here. *See supra* note 1 (citing, *inter alia*, five pre-*Abbott* district court cases); *Abbott*, 51 F.3d at 528 n.8 (listing numerous district court cases addressing whether Section 1367 overrules *Zahn*); *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 716 & nn. 11, 12 (C.D. Cal. 1995) (same). There is no logical reason to exclude such cases in assessing the significance of the issue.

Even if one were to accept these narrowing criteria, Respondents are wrong. There are cases "in which a court has applied the *Abbott* ruling to find federal jurisdiction over a class action where such jurisdiction would not otherwise have existed." (Brief in Opp. at 6). Respondents missed at least three such cases. *See, e.g., Cunningham v. IBM*, 971 F. Supp. 1051 (M.D. La. 1997); *Kimball v. Modern Woodman of Am.*, 939 F. Supp. 479 (M.D. La. 1996); *Millet v. Marathon Oil Co.*, No. 95-1549, 1995 U.S. Dist. LEXIS 12359 (E.D. La. Aug. 16, 1995).[4]

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4. In addition, in *Brooks v. Georgia Gulf Corp.*, 924 F. Supp. 739 (M.D. La. 1996), a class action, the court held the amount in controversy to be satisfied because: (1) punitive damages can be aggregated under Louisiana law and, alternatively; (2) under *Abbott* the named plaintiff satisfied the jurisdictional minimum by virtue of the attorney fees and thus conferred supplemental jurisdiction over class members who did not. The first ground for jurisdiction in *Brooks* was overruled in *Ard v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998). Thus, the only current basis for jurisdiction in *Brooks* is the rule of *Abbott* and *Stromberg*.

Respondents also err in suggesting that the Louisiana statute (Article 595) that gives rise to the unevenness here is unique among state statutes. A New York statute is nearly identical to Article 595. *See* N.Y. Civ. Prac. L. & R. § 909 (McKinney 1999) ("the court in its discretion may award attorney's fees to the representatives of the class. . . ."). The federal courts in New York have held that *Zahn* is still good law and therefore have not allowed the unevenness resulting from this statute to confer federal jurisdiction. *McGowan v. Cadbury Schweppes, PLC*, 941 F. Supp. 344, 347-48 (S.D.N.Y. 1996); *Bernard v. Gerber Food Prods. Co.*, 938 F. Supp. 218, 224 (S.D.N.Y. 1996). A Massachusetts statute provides class action attorney fees to "the petitioner," which, at Respondents' behest, has been held to mean "the *named* party plaintiff." *Boos v. Abbott Labs.* (Brief in Opp. at 38a). Respondents now contend that *Boos* was "not correct" in its conclusion that the Massachusetts law operates just like the Louisiana statute. (Brief in Opp. at 11 n.1). But Respondents are judicially estopped from making this about-face. *See Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 12-13 (1st Cir. 1999) (judicial estoppel prohibits party from contradicting litigation position on which it previously succeeded and should be applied "when a litigant is playing fast and loose with the courts.").

Other state statutes create rights that result in unevenness in the amount in controversy among plaintiffs or class members. *See* Fla. Stat. Ch. 627.428 (1999) (mandating award of attorney fees "in favor of any named or omnibus insured" in any judgment against insurer); *Howard v. Globe Life Ins. Co.*, 973 F. Supp. 1412, 1421 (N.D. Fla. 1996) (holding that chapter 627.428 requires attributing all fees to the named plaintiffs in a class action and finding federal jurisdiction based on *Abbott*); Conn. Gen. Stat. § 42-110g(d) ("In a class action in which there is no monetary recovery, but other relief is granted on behalf of the class, the court may award, to the plaintiff, in addition to

other relief provided in this section, costs and reasonable attorneys' fees."). It is difficult even to begin accounting for the numerous types of substantive and procedural state statutes that can have this effect, given their potential diversity. For example, in *In re Brand Name Prescription Drugs*, a state-law price fixing case by Alabama consumers of prescription drugs, the court held it was plausible that an Alabama statute allowing $500 for each instance of injury or damages could very well push at least one named plaintiff over the $50,000 threshold if a named plaintiff had made at least 100 purchases during the four-year class period; however, the defendants, who had removed the case, failed to produce evidence regarding the number of purchases so the case was remanded. 123 F.3d 607-08 ("the defendants cannot simply waive the statute in our faces"). Thus, any state law providing per-violation penalties will create unevenness in the amount in controversy among plaintiffs or class members.

In short, the cases are legion in which there is an uneven amount in controversy among plaintiffs or class members and there are numerous state statutes that cause such unevenness. This unevenness may result from the differing impact of defendants' conduct upon the plaintiffs or class members, as in *Zahn*, *Meritcare*, and *Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. 808, 811 (E.D. Pa. 1997), from the operation of various state law rights of recovery, as in *Abbott*, *Boos* (Brief in Opp. at 32a-43a), and *Howard v. Globe Life Ins. Co.*, 973 F. Supp. 1412, 1420 (N.D. Fla. 1996), or simply from a failure to meet the jurisdictional burden of proof with respect to the claims of some plaintiffs or class members. Under the rule of the Fifth and Seventh Circuits, such cases will be allowed *in toto* into federal court.

II.
RESPONDENTS' ARGUMENT ON THE MERITS IS INAPT.

Respondents have spilled much ink to establish a proposition of statutory interpretation with which no one takes issue: that an unambiguous statute generally is applied as written. Having set up a straw man by inferring that Petitioners are at odds with this proposition, Respondents proceed to knock it down repeatedly. What they have missed, however, is that numerous courts have recognized this same principle of statutory interpretation while concluding that Section 1367 does not overrule *Zahn*.

For example, the Tenth Circuit held that Section 1367 is unambiguous and that it preserves, not overrules, *Zahn*. *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640 (10th Cir. 1998) ("In our view a literal and textually faithful reading of § 1367(a) leads to the opposite conclusion from that of the Fifth and Seventh Circuits."). Other courts also have held section 1367 to be unambiguous in its preservation of *Zahn*. *See, e.g., Crosby v. America Online, Inc.*, 967 F. Supp. 257, 263 n.4 (N.D. Ohio 1997); *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 716 (C.D. Cal. 1995). These cases focus on subsection (a) of Section 1367 and hold that Congress did not alter the long-standing meaning of the diversity statute's "matter in controversy" requirement. Respondents never attempt to address this issue but rush headlong into an extended discussion of whether "Rule 23" of the Federal Rules of Civil Procedure should be read into the exceptions listed in subsection (b).

Further, there are important exceptions to the principle of statutory construction relied upon by Respondents. The Third Circuit held that the proper construction of Section 1367 requires the application of one such exception:

> Even were we to conclude that Section 1367 is unambiguous, as *Abbott Laboratories* read it, we would nevertheless turn to the legislative history because this is one of those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Sherman*, 150 F.3d 306, 313 (internal quotation marks removed, alterations in original); see also *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (same).

Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 222 (3d Cir. 1999). This exception is well-established by this Court. *See, e.g., Griffin v. Ocean Contractors, Inc.*, 458 U.S. 564, 571 (1982) ("[I]n rare cases the literal application of a statute will produce results demonstrably at odds with the intentions of its drafters, and those intentions must be controlling."). Here, there is no doubt, and Respondents do not contest, that Congress meant to preserve *Zahn*.

In short, *Leonhardt*, *Meritcare* and similar cases demonstrate that Respondents are simply wrong in stating that the principle of statutory construction on which they rely is "dispositive" of the issue presented. (Brief in Opp. at 15).

Finally, Respondents' contention that the meaning of Section 1367 is obvious flatly conflicts with the view of the large number of courts that either disagree with Respondents' reading or conclude the statute is ambiguous. Respondents wrongly suggest that the large number of cases disagreeing with their interpretation is utterly meaningless. What those cases demonstrate is that the meaning of Section 1367 is not as obvious as Respondents contend and that resolution of the divergent views on this jurisdictional issue by this Court is needed.

CONCLUSION

For these reasons, as well as those stated in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 18 2000
CLERK

(10)

No. 99-391

IN THE

Supreme Court of the United States

ROBIN FREE and RENEE FREE,

Petitioners,

v.

ABBOTT LABORATORIES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1999
CERTIORARI GRANTED NOVEMBER 29, 1999

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APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

U.S. District Court
Middle District of Louisiana (Baton Rouge)

CIVIL DOCKET FOR CASE #: 93-CV-971

Free, et al v. Abbott Laboratories, et al
Filed: 11/16/93
Assigned to: Judge John V. Parker
Jury demand: Defendant
Demand: $50,000
Nature of Suit: 410
Lead Docket: None
Jurisdiction: Federal Question
Dkt # in 18th JDC, WDLA : is 25428 D

Cause: 28:1331 Fed. Question: Anti-trust

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[COR]
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(See above)
[COR]

11/16/93 1 NOTICE OF REMOVAL; FILING FEE $ 120.00 RECEIPT # 53964 (bm)

11/16/93 — Set magistrate assignment. (bm)

11/16/93 2 MOTION by Abbott Laboratories, Bristol-Meyers Squib, Mead Johnson & Co. to Extend Time to Plead (bm)

Appendix A

11/17/93 3 ORDER granting [2-1] motion to Extend Time to Plead, reset Answer deadline to 12/21/93 for Mead Johnson & Co., for Bristol-Meyers Squib, for Abbott Laboratories (signed by Mag. Judge Stephen C. Riedlinger), issued notices. (bm)

11/18/93 4 ORDER, set Status Report deadline to 2/14/94, set Status Conference for 11:00 3/3/94 before SCR (signed by MAG1 CRD), issued notices. (bm)

11/30/93 5 MOTION by Robin Free, Renee Free to Remand (Motion Hearing set for 10:00 1/7/94 before JVP) (ph)

11/30/93 6 MEMORANDUM by Robin Free, Renee Free in support of [5-1] motion to Remand by Renee Free, Robin Free (ph)

12/7/93 7 MOTION by Abbott Laboratories for James Andrew Langan and Frank Cicero, Jr to Appear Pro Hac Vice (bm) [Entry date 12/08/93]

12/8/93 8 ORDER granting [7-1] motion for James Andrew Langan and Frank Cicero, Jr to Appear Pro Hac Vice (signed by Mag. Judge Stephen C. Riedlinger), issued notices. (bm)

12/13/93 9 MOTION by Robin Free, Renee Free for Permission to Substitute Brief in Support of Motion to Remand (bm)

Appendix A

12/13/93	10	MEMORANDUM by Robin Free, Renee Free in support of [9-1] motion for Permission to Substitute Brief by Renee Free, Robin Free (bm)
12/14/93	11	ORDER granting [9-1] motion for Permission to Substitute Brief (Brief attached to mtn to substitute) (signed by Chief Judge John V. Parker), issued notices. (pa)
12/16/93	12	MOTION by Abbott Laboratories, Bristol-Meyers Squib, Mead Johnson & Co. to Continue Hearing on pltfs' motion to remand presently set for 1/7/93, and set Briefing Schedule (bm) [Entry date 12/17/93]
12/16/93	13	MOTION by Abbott Laboratories, Bristol-Meyers Squib, Mead Johnson & Co. to Extend Time to File Responsive Pleadings (bm) [Entry date 12/17/93]
12/17/93	14	ORDER granting [12-1] motion to Continue Hearing, Motion Hearing set for 10:00 1/21/94 for [5-1] motion to Remand (signed by Chief Judge John V. Parker), issued notices. (bm) [Entry date 12/20/93]
12/17/93	15	ORDER granting [13-1] motion to Extend Time to File Responsive Pleadings, Response to Motion reset to 1/14/94 for [5-1] motion to Remand (signed by Mag. Judge Stephen C. Riedlinger), issued notices. (bm) [Entry date 12/20/93]

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12/22/93	16	MOTION by Bristol-Meyers Squib, Mead Johnson & Co. for Douglas Broadwater and Max Shulman to Appear Pro Hac Vice (rg) [Entry date 12/23/93]
12/23/93	17	ORDER granting [16-1] motion for Douglas Broadwater and Max Shulman to Appear Pro Hac Vice (signed by Mag. Judge Stephen C. Riedlinger), issued notices. (rg) [Entry date 12/27/93]
1/14/94	18	MEMORANDUM by Abbott Laboratories, Bristol-Meyers Squib, Mead Johnson & Co. in opposition to [5-1] motion to Remand by Renee Free, Robin Free (bm) [Entry date 01/18/94]
1/24/94	19	Minute entry (Dated 1/21/94): . . . matter came for oral argument . . . [5-1] motion to Remand under advisement (signed by Chief Judge John V. Parker), issued notices (bm)
2/14/94	20	NINETY DAY STATUS REPORT by Robin Free, Renee Free, Abbott Laboratories (bm) [Entry date 05/10/94]
3/4/94	21	ORDER, terminated deadline for status conf previously set for 3/3/94, subject to reassignment if case is not remanded (signed by Mag. Judge Stephen C. Riedlinger), issued notices. (bm) [Entry date 05/10/94]

4/5/94	22	RULING granting [5-1] motion to Remand and this action will be remanded to the 18th JDC for the Parish of West Baton Rouge, LA (signed by Chief Judge John V. Parker), issued notices. (bm) [Entry date 04/06/94] [Edit date 04/28/94]
4/6/94	23	ORDER, Remanding Action to the 18th JDC for the Parish of West Baton Rouge, LA (signed by Chief Judge John V. Parker), issued notices. (bm) [Entry date 04/07/94] [Edit date 04/28/94]
4/6/94	—	Case closed (bm) [Entry date 04/11/94]
4/20/94	24	MOTION by Abbott Laboratories, Bristol-Meyers Squib, Mead Johnson & Co. for Reconsideration of [22-1] ruling order (Motion Hearing set for 10:00 6/3/94) (bm) [Entry date 04/21/94] [Edit date 04/28/94]
4/20/94	25	MEMORANDUM by Abbott Laboratories, Bristol-Meyers Squib, Mead Johnson & Co. in support of [23-1] motion for Reconsideration of [22-1] ruling order by Mead Johnson & Co., Bristol-Meyers Squib, Abbott Laboratories (bm) [Entry date 04/21/94] [Edit date 04/28/94]
5/6/94	26	NOTICE OF APPEAL by Abbott Laboratories, Bristol-Meyers Squib, Mead Johnson & Co.. FILING FEE $ 105.00 RECEIPT # 54972

		Appeal record due on 6/6/94 appealing order remanding action to the 18th JDC filed on 4/7/94 . . . copies mailed to Pendley, D'Armond and USCA (bm) [Entry date 05/09/94] [Edit date 05/10/94]
5/6/94	—	USCA appeal fees received FILING FEE $ 105.00 RECEIPT # 54972 by Abbott Laboratories, Bristol Myers Squibb and Mead Johnson (bm) [Entry date 05/09/94] [Edit date 05/09/94]
5/6/94	—	USCA Case Number Re: [26-1] appeal by Mead Johnson & Co., Bristol-Meyers Squib, Abbott Laboratories USCA NUMBER: 94-30279 (qca) [Entry date 08/19/94]
5/9/94	—	Notice of Appeal and certified copy of docket to USCA: [25-1] appeal by Mead Johnson & Co., Bristol-Meyers Squib, Abbott Laboratories (bm)
5/11/94	27	MEMORANDUM by Robin Free, Renee Free in opposition to [24-1] motion for Reconsideration of [22-1] ruling order by Mead Johnson & Co., Bristol-Meyers Squib, Abbott Laboratories (rg)
5/20/94	—	Transmitted Supplemental Record on Appeal: [26-1] appeal by Mead Johnson & Co., Bristol-Meyers Squib, Abbott Laboratories dkt #27 14 pages (bm)

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5/23/94	28	MOTION by Abbott Laboratories, Bristol-Meyers Squib, Mead Johnson & Co. for Leave to File reply memo in support of their motion for reconsideration (bm) [Entry date 05/24/94]
5/24/94	—	HOLDING REPLY MEMO FOR LEAVE TO FILE RE #28 (bm)
5/24/94	29	ORDER granting [28-1] motion for Leave to File reply memo (in support of their motion for reconsideration signed by Chief Judge John V. Parker), issued notices. (bm)
5/24/94	30	REPLY MEMORANDUM by Abbott Laboratories, Bristol-Meyers Squib, Mead Johnson & Co. in support of [24-1] motion for Reconsideration of [22-1] ruling order by Mead Johnson & Co., Bristol-Meyers Squib, Abbott Laboratories (bm)
6/21/94	31	RULING denying [24-1] motion for Reconsideration of [22-1] ruling order (signed by Chief Judge John V. Parker), issued notices. (bm)
6/28/94	32	Subsequent NOTICE OF APPEAL by Abbott Laboratories, Bristol-Meyers Squib, Mead Johnson & Co.; re: [26-1] appeal by Mead Johnson & Co., Bristol-Meyers Squib, Abbott Laboratories (qca) [Entry date 06/29/94]

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6/29/94	—	Notice of Appeal and certified copy of docket to USCA: [26-1] appeal by Mead Johnson & Co., Bristol-Meyers Squib, Abbott Laboratories (amendment to notice of appeal sent 6/29/94) (rg)
7/12/94	—	Transmitted Supplemental Record on Appeal: [26-1] appeal by Mead Johnson & Co., Bristol-Meyers Squib, Abbott Laboratories documents 28 – 32 (bm) [Edit date 07/12/94]
4/25/95	33	ANSWER to Complaint by Abbott Laboratories (sh) [Entry date 04/26/95]
4/26/95	34	ANSWER to Complaint by Abbott Laboratories, Bristol-Meyers Squib, Mead Johnson & Co. (Attorney Phillip A. Wittmann, John M. Landis, Edwin H. Neill III), (sh) [Entry date 04/27/95]
4/27/95	35	ORDER/Opinion . . . USCA . . . petition for mandamus is denied ( ), issued notices. (sh) [Entry date 04/28/95]
9/13/95	36	MANDATE OF USCA (certified copy) Re: the remand order of the district court in this cause is vacated and the cause is remanded to the district court for further proceedings in accordance with the opinion of this court . . . each pty bear its own costs on appeal [26-1] appeal by Mead Johnson & Co., Bristol-Meyers Squib, Abbott Laboratories (sh)

9/13/95	—	Record on Appeal returned from U.S. Court of Appeals: [26-1] appeal (sh)
9/13/95	—	Case reopened (sh)
9/13/95	—	Set magistrate assignment. (sh)
11/15/95	37	NOTICE of Hearing: set Status Conference for 3:00 12/21/95 CRD PS, issued notices. (sh)
12/21/95	—	Status Conference held (sh) [Entry date 01/05/96]
1/5/96	38	SCHEDULING ORDER setting Motion Filing deadline on 2/23/96 for dfts to file a mot for S/J on the issue of standing . . . this matter will be reviewed in approximately 60 days and will be assigned for stat cnf if a mot for S/J has not been filed (signed by Mag. Judge Stephen C. Riedlinger), issued notices. (sh)
2/22/96	39	ORDER the scheduling order deadline for filing dispositive mots be suspended as to dft Abbott Lab . . . this matter will be reviewed in about 90 days (signed by Mag. Judge Stephen C. Riedlinger), issued notices. (sh)
2/23/96	40	LETTER to SCR from William D'Armond re: continuance of dispositive mot deadline (sh)

2/23/96	41	MOTION by Bristol-Meyers Squib, Mead Johnson & Co. to Dismiss (Motion Hearing set for 10:00 4/5/96) (sh) [Entry date 02/26/96]
2/23/96	41	MOTION by Bristol-Meyers Squib, Mead Johnson & Co. for Summary Judgment (Motion Hearing set for 10:00 4/5/96) (sh) [Entry date 02/26/96]
2/23/96	42	MEMORANDUM by Bristol-Meyers Squib, Mead Johnson & Co. in support of [41-1] motion for Summary Judgment by Mead Johnson & Co., Bristol-Meyers Squib, [41-1] motion to Dismiss by Mead Johnson & Co., Bristol-Meyers Squib (sh) [Entry date 02/26/96]
2/23/96	43	EXHIBIT(S) to memo in support of mot to dismiss or for S/J by Britol Meyers and Mead Johnson (sh) [Entry date 02/26/96]
3/18/96	44	MEMORANDUM by Robin Free, Renee Free in opposition to [41-1] motion for Summary Judgment by Mead Johnson & Co., Bristol-Meyers Squib, [41-1] motion to Dismiss by Mead Johnson & Co., Bristol-Meyers Squib (sh)
3/18/96	45	EXHIBIT(S) to pltfs memo in opp to dfts mot to dismiss or S/ (sh)

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3/29/96	46	MOTION by Bristol-Meyers Squib, Mead Johnson & Co. for Leave to File Reply Memo in support of motion to dismiss or for s/j (hj)
3/29/96	—	Holding Reply Memo in support of dfts' motion to dismiss or for s/j (hj)
4/1/96	47	MOTION by Robin Free, Renee Free for Leave to File supplemental memo in support of memo in opposition to defts motion to dismiss or in the alternative, for SJ (ph)
4/1/96	—	holding supplemental memo in support of memo in opposition to defts motion to dismiss or, in the alternative, for SJ (ph)
4/1/96	48	ORDER granting [47-1] motion for Leave to File supplemental memo in support of memo in opposition to defts motion to dismiss (signed by Chief Judge John V. Parker), issued notices. (ph)
4/1/96	49	MEMORANDUM by Robin Free, Renee Free in opposition to [41-1] motion for Summary Judgment by Mead Johnson & Co., Bristol-Meyers Squib, [41-1] motion to Dismiss by Mead Johnson & Co., Bristol-Meyers Squib (ph)
4/1/96	50	ORDER granting [46-1] motion for Leave to File Reply Memo in support of motion to dismiss or for s/j (signed by Chief Judge John V. Parker), issued notices. (ph)

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4/1/96	51	REPLY by Bristol-Meyers Squib to response to [41-1] motion for Summary Judgment by Mead Johnson & Co., Bristol-Meyers Squib, [41-1] motion to Dismiss by Mead Johnson & Co., Bristol-Meyers Squib (ph)
5/8/96	52	MOTION by Bristol-Meyers Squib, Mead Johnson & Co. for Leave to File Suppl Memo in Support of Mot to Dismiss (rg)
5/9/96	53	ORDER granting [52-1] motion for Leave to File Suppl Memo in Support of Mot to Dismiss (signed by Chief Judge John V. Parker), issued notices. (rg)
5/9/96	54	SUPPLEMENTAL MEMORANDUM by Bristol-Meyers Squib, Mead Johnson & Co. in support of [41-1] motion for Summary Judgment by Mead Johnson & Co., Bristol-Meyers Squib, [41-1] motion to Dismiss by Mead Johnson & Co., Bristol-Meyers Squib (rg)
5/22/96	55	MOTION by Robin Free, Renee Free for Leave to File second supplemental memo in support of original memo in opposition to defts motion to dismiss or in the alternative, for SJ (ph)
5/22/96	—	holding second supplemental memo in support of original memo in opposition to defts mot to dismiss or in the alternative for SJ (ph)

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5/22/96 56 ORDER granting [55-1] motion for Leave to File second supplemental memo in support of original memo in opposition to defts motion to dismiss or in the alternative, for SJ filed by pla (signed by Chief Judge John V. Parker), issued notices. (ph)

5/22/96 57 SECOND Supplemental MEMORANDUM by Robin Free, Renee Free in support of [49-1] of original opposition memorandum to defts motion to dismiss or in the alternative, for SJ by Renee Free, Robin Free (ph)

5/30/96 58 JOINT MOTION by Robin Free, Renee Free, Abbott Laboratories for order prelininarily approving partial settlement, setting Hearing, and directing notice to class (sh)

5/30/96 59 MEMORANDUM by Robin Free, Renee Free, Abbott Laboratories in support of [58-1] joint motion for order prelininarily approving partial settlement by Abbott Laboratories, Renee Free, Robin Free, [58-2] joint motion setting Hearing, and directing notice to class by Abbott Laboratories, Renee Free, Robin Free (sh)

5/31/96 60 ORDER granting jt mot of pltfs and Abbott Laboratories [58-1] joint motion for order prelininarily approving partial settlement (signed by Chief Judge John V. Parker), issued notices. (sh)

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7/10/96 61 JOINT MOTION by Robin Free, Renee Free, Abbott Laboratories, Bristol-Meyers Squib, Mead Johnson & Co. to Amend [60-1] order (sh) [Entry date 07/11/96]

7/12/96 62 PROPOSED ORDER granting [61-1] joint motion to Amend [60-1] order regarding the Bristol Settlement, that the date by which publication of notice of the settlement w/ Abbott Laboratories, Inc. must be accomplished is deferred pending further order of the court (signed by Chief Judge John V. Parker), issued notices. (sh)

9/3/96 63 ORDER this matter is referred to the Honorable SCR for the purpose of conducting a settlement cnf (signed by Chief Judge John V. Parker), issued notices. (sh)

9/6/96 64 JOINT MOTION by Robin Free, Renee Free, Bristol-Meyers Squib, Mead Johnson & Co. for order preliminarily approving partial settlement, setting hrg and directing notice to class (sh) [Edit date 02/12/98]

9/6/96 65 MEMORANDUM by Robin Free, Renee Free, in support of [64-1] joint motion for order preliminarily approving partial settlement, setting hrg and directing notice to class by Mead Johnson & Co., Bristol-Meyers Squib, Abbott Laboratories, Renee Free, Robin Free (sh) [Edit date 02/12/98]

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9/6/96 66 ORDER granting [64-1] joint motion by plft's & dft's Bristo-Myers and Mead Johnson & Company (together "Bristol") for order preliminarily approving partial settlement, setting hrg and directing notice to class (signed by Chief Judge John V. Parker), issued notices. (sh) [Edit date 02/12/98]

9/6/96 — Status Conference held (sh) [Entry date 09/09/96]

9/9/96 67 STATUS Conference Report . . . cnsl presented a jt mot for preliminary approval of a settlement agreement as to the claims against Bristol-Meyres Squibb and Mead Johnson . . . if preliminary approval is obtained in this case and in cases pending in 14 other states, the parties will request that a date be fixed for a fairness hrg (signed by Mag. Judge Stephen C. Riedlinger), issued notices. (sh)

10/10/96 68 MOTION by Robin Free, Renee Free for Fairness Hearing (Motion Hearing set for 9:00 12/16/96) (sh) [Entry date 10/11/96]

10/11/96 69 ORDER granting all pltfs [68-1] motion for Fairness Hearing, set fairness Hearing for 12/16/96 at 9:00 a.m. at US Courthouse (signed by Chief Judge John V. Parker), issued notices. (sh) [Edit date 12/09/96]

12/9/96 70 MEMORANDUM by Robin Free, Renee Free in support of final approval of the settlements

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with dfts Abbott, Bristol-Myers and Mead Johnson (dcap) [Entry date 12/10/96]

12/9/96 71 JOINT MOTION by Robin Free, Renee Free for Attorney Fees and Reimbursement of Expenses (kd) [Entry date 12/11/96]

12/9/96 72 EXHIBIT to Jt motion for Attorney Fees and Reimbursement of Expenses (kd) [Entry date 12/11/96]

12/16/96 73 LETTER . . . To: Clerk From: Karla M. Gluek Ref: Copy of Letter that relates to settlement procedures. (kd) [Entry date 12/17/96]

12/20/96 74 Minute entry: 12/16/96 Fairness hearing was held . . . [71-1] joint motion for Attorney Fees and Reimbursement of Expenses under advisement (signed by Chief Judge John V. Parker), issued notices (kd)

1/5/97 — USCA Case Number Re: [99-1] appeal by Renee Free, Robin Free USCA NUMBER: 97-31341 (hj) [Entry date 01/06/98]

1/13/97 75 LETTER . . . To: Mr. Hosto . . . From: Eric Olson Ref: Settlement of this class action. (kd) [Entry date 01/14/97]

1/21/97 76 RULING denying [71-1] joint motion for Attorney Fees and Reimbursement of Expenses . . . the court finds that the

proponents have failed to present sufficient info to allay the concerns of the court . . . Because the settlement is not approved, the court does not reach counsel's motion for attorney fees and reimburesement of expenses. (signed by Chief Judge John V. Parker), issued notices. (kd)

2/13/97 77 MOTION by Abbott Laboratories, Mead Johnson & Co. for Reconsideration of [76-1] ruling order (Motion Hearing set for 10:00 3/21/97) (kd) [Entry date 02/14/97]

2/13/97 78 MEMORANDUM by Abbott Laboratories, Mead Johnson & Co. in support of [77-1] motion for Reconsideration of [76-1] ruling order by Mead Johnson & Co., Abbott Laboratories (kd) [Entry date 02/14/97]

2/13/97 79 EXHIBIT(S) to Memo to in Support of Motion for Reconsideration (kd) [Entry date 02/14/97]

3/3/97 80 MOTION by Robin Free, Renee Free to Extend Time to respond to dft's motion for Reconsideration (kd)

3/3/97 81 ORDER granting [80-1] plft's motion to Extend Time to respond to dft's motion for Reconsideration, Response to Motion reset to 3/12/97 for [77-1] motion for Reconsideration of [76-1] ruling order (signed by Chief Judge John V. Parker), issued notices. (kd)

3/12/97 82 MEMORANDUM by Robin Free, Renee Free in support of [77-1] motion for Reconsideration of [76-1] ruling order by Mead Johnson & Co., Abbott Laboratories (kd) [Entry date 02/12/98]

4/22/97 83 TRANSCRIPT filed for dates of 12/16/96 of Settlement Hearing. (kd)

4/22/97 84 RULING denying [77-1] dft's motion for Reconsideration of [76-1] ruling order . . . All parties are hereby granted leave to submit additional affidavits, evidence and briefs on those motions within 30 days of the date of this ruling, after which the motions will be considered submitted. (signed by Chief Judge John V. Parker), issued notices. (kd)

5/16/97 85 MOTION by Abbott Laboratories to Dismiss, or in the alternative for Summary Judgment (Motion Hearing set for 10:00 7/18/97) (kd)

5/16/97 86 MEMORANDUM by Abbott Laboratories in support of [85-1] motion to Dismiss by Abbott Laboratories, [85-2] motion for Summary Judgment by Abbott Laboratories (kd)

5/16/97 87 Statement of Facts not in dispute by Abbott Laboratories. (kd) [Edit date 05/16/97]

5/16/97 88 MOTION by Abbott Laboratories to reset hearing on its motion to dismiss or in the alternative for SJ (kd)

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5/22/97	89	MEMORANDUM by Robin Free, Renee Free in opposition to [85-1] motion to Dismiss by Abbott Laboratories, [85-2] motion for Summary Judgment by Abbott Laboratories (kd)
5/22/97	90	MEMORANDUM by Abbott Laboratories, Bristol-Meyers Squib, Mead Johnson & Co. in support of [85-1] motion to Dismiss by Abbott Laboratories, [85-2] motion for Summary Judgment by Abbott Laboratories (kd)
9/10/97	91	MOTION by Robin Free, Renee Free for Leave to File Supplemental Memo (kd) [Entry date 09/11/97]
9/10/97	—	Holding plft's supplemental memo in opp to dft's motion to dismiss or for SJ (kd) [Entry date 09/11/97]
9/11/97	92	ORDER granting [91-1] plft's motion for Leave to File Supplemental Memo (signed by Chief Judge John V. Parker), issued notices. (kd)
9/11/97	93	SUPPLEMENTAL MEMORANDUM by Robin Free, Renee Free in opposition to [85-1] motion to Dismiss by Abbott Laboratories, [85-2] motion for Summary Judgment by Abbott Laboratories (kd)

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9/25/97	94	MOTION by Bristol-Meyers Squib, Mead Johnson & Co. for Leave to File supplemental memo in support of mot to dismiss or for SJ (kd)
9/25/97	—	Holding supplemental memo in support of mot to dismiss or for SJ (kd)
9/25/97	95	ORDER granting [94-1] dft's motion for Leave to File supplemental memo in support of mot to dismiss or for SJ (signed by Chief Judge John V. Parker), issued notices. (kd)
9/25/97	96	SUPPLEMENTAL MEMORANDUM by Bristol-Meyers Squib in support of [85-1] motion to Dismiss by Abbott Laboratories, [85-2] motion for Summary Judgment by Abbott Laboratories (kd) [Edit date 09/25/97]
11/6/97	97	RULING granting [85-1] dft's motion to Dismiss and this action will be dimissed. (signed by Chief Judge John V. Parker), issued notices. (kd)
11/7/97	98	JUDGMENT . . . Dft's motion for DISMISSAL is hereby GRANTED, and this action is hereby DISMISSED. (signed by Chief Judge John V. Parker), issued notices. (kd) [Edit date 02/12/98]
11/7/97	—	Case closed (kd)

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11/19/97 99 NOTICE OF APPEAL by Robin Free, Renee Free . . . from the final judgment entered on 11/7/97. FILING FEE $ 105.00 RECEIPT # 62794 Appeal record due on 12/19/97 (hj) [Entry date 11/20/97]

12/17/97 — Notice of Appeal and certified copy of docket to USCA: [99-1] appeal by Renee Free, Robin Free (hj)

12/17/97 — Certified and transmitted Record on Appeal to U.S. Court of Appeals: [99-1] appeal by Renee Free, Robin Free (hj)

6/9/99 — Transmitted Supplemental Record on Appeal: [99-1] appeal by Renee Free, Robin Free (hcj)

6/30/99 100 MANDATE OF USCA (certified copy) Re: [99-1] appeal by Renee Free, Robin Free Decision of COA: Affirmed (hcj) [Entry date 07/01/99]

6/30/99 — Record on Appeal returned from U.S. Court of Appeals: [99-1] appeal (hcj) [Entry date 07/01/99]

12/1/99 — Record on Appeal returned from U.S. Court of Appeals: [99-1] appeal (hcj)

[END OF DOCKET: 3:93cv971]

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GENERAL DOCKET FOR
Fifth Circuit Court of Appeals

Court of Appeals Docket #: 97-31341
Filed: 12/29/97
Nsuit: 4190
Contract: Other
Free, et al v. Abbott Laboratories, et al
Appeal from: Middle District of Louisiana, Baton Rouge

Lower court information:

District: 053N-3 : 93-CV-971-A
Ordering Judge: John V Parker, US District Judge
Date Filed: 11/16/93
Date order/judgment: 11/7/97
Date NOA filed: 11/19/97

Fee status: Paid

Prior cases: None

Current cases: None

Appendix B

ROBIN FREE
Plaintiff – Appellant

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225-687-6396
[COR NTC ret]
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Plaquemine, LA 70764

Daniel Adam Small
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Michael D Hausfeld
(202) 408-4600
[NTC ret]
Cohen, Milstein, Hausfeld & Toll
1100 New York Avenue, NW
Suite 500 West Tower
Washington, DC 20005

RENEE FREE
Plaintiff – Appellant

Patrick W Pendley
(See above)
[COR NTC ret]

Appendix B

Daniel Adam Small
(See above)
[COR LD NTC ret]
Matthew F Pawa
(See above)
[COR NTC ret]
Michael D Hausfeld
(See above)
[NTC ret]

v.

ABBOTT LABORATORIES, INC
Defendant – Appellee

William R D'Armond
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225-387-0999
22nd Floor
[COR NTC ret]
Kean, Miller, Hawthorne,
D'Armond, McCowan & Jarman
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Frank Brian Cicero, Jr
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BRISTOL MYERS-SQUIBB COMPANY, INC
Defendant – Appellee

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(212) 474-1754

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John M Landis
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Phillip A Wittmann
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504-581-3200
[COR NTC ret]
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Wittmann & Hutchinson
546 Carondelet Street
New Orleans, LA 70130

MEAD JOHNSON & CO
Defendant – Appellee

Max Rees Shulman
(See above)
[COR LD NTC ret]

John M Landis
(See above)
[COR NTC ret]
Phillip A Wittmann
(See above)
[COR NTC ret]

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STATE OF LOUISIANA
Amicus Curiae

Jane Bishop Johnson
225-342-2754
6th Floor
[COR LD NTC gvt]
Louisiana Department of Justice
301 Main Street
One American Place
Baton Rouge, LA 70801

12/29/97 Private civil diversity case docketed. NOA filed by Appellant Robin Free, Appellant Renee Free. [97-31341]

12/29/97 Record on appeal filed. Pleadings: 4 vols. Exhibits: 1 box [97-31341]

1/6/98 Briefing notice issued. [97-31341] A/Pet's Brief due on 2/17/98 for Renee Free, for Robin Free.

1/7/98 Appearance form filed by Phillip A Wittmann for Appellee Mead Johnson & Co, Appellee Bristol Myers-Squibb, Max Rees Shulman for Appellee Mead Johnson & Co, Appellee Bristol Myers-Squibb. [97-31341]

1/9/98 Appearance form filed by Patrick W Pendley for Appellant Renee Free, Appellant Robin Free. [97-31341]

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1/13/98 Appearance form filed by Matthew F Pawa for Appellant Renee Free, Appellant Robin Free, Daniel Adam Small for Appellant Renee Free, Appellant Robin Free. [97-31341]

1/14/98 Appearance form filed by Craig A Knot for Appellee Abbott Laboratories, Frank Brian Cicero for Appellee Abbott Laboratories. [97-31341]

2/5/98 Appearance form filed by William R D'Armond for Appellee Abbott Laboratories. [97-31341]

2/16/98 Record on appeal returned to 5CCA. Volumes: 2 (vols 3 and 4) [97-31341]

2/19/98 Motion filed by Appellant Robin Free, Appellant Renee Free to certify question to State Supreme Court. [876418-1] Response/ Opposition due on 3/11/98. (SUBMIT TO SCREENING JUDGE AND PANEL) [97-31341]

2/20/98 The attorney Gordon Ball for Renee Free, attorney Don Barrett for Renee Free not participating in case. [97-31341]

2/20/98 Appellant's Brief filed by Appellant Robin Free, Appellant Renee Free. Copies of brief: 7 # of pages: 30. Date of COS: 2/17/98 Sufficient [Y/N]: Y. [97-31341] A/Pet's Brief

ddl satisfied. E/Res's Brief due on 3/23/98 for Mead Johnson & Co, for Bristol Myers-Squibb, for Abbott Laboratories.

2/20/98 Record excerpts filed by Appellant Robin Free, Appellant Renee Free # of copies: 4 Sufficient [Y/N]: N, excess pages. [97-31341] Sufficient Record Excerpts due on 3/13/98 for Renee Free, for Robin Free

2/20/98 The attorney Gordon Ball for Renee Free, attorney Don Barrett for Renee Free, attorney Howard J Sedran for Renee Free, attorney Daniel Elvin Gustafson for Renee Free, attorney Gordon Ball for Robin Free, attorney Don Barrett for Robin Free, attorney Howard J Sedran for Robin Free, attorney Daniel Elvin Gustafson for Robin Free not participating in case. [97-31341]

3/4/98 Motion filed by The State of Louisiana to file amicus brief on behalf of appellants Robin and Renee Free. [878753-1] Response/Opposition due on 3/13/98. [97-31341]

3/11/98 Response/opposition filed by Appellee Abbott Laboratories, Appellee Bristol Myers-Squibb, Appellee Mead Johnson & Co to motion to certify ques to St Sup Ct. [876418-1] by Appellant Robin Free, Renee Free [886793-1] [97-31341]

3/12/98 Motion filed by Appellant Robin Free, Appellant Renee Free to file record excerpts in excess of the page limitation. [889362-1] [97-31341]

3/16/98 CLERK Order filed granting unopposed motion of appellants to file rec.exc in excess pgs [889362-1] The clerk is granting your unopposed motion for the Court subject to possible reconsideration by the merit panel at a later date. (SEND MOTION, LETTER, AND EXCERPTS TO SCREENING JUDGE AND PANEL) Copies to all counsel. [97-31341]

3/16/98 Record Excerpts made sufficient by Appellant Robin Free, Appellant Renee Free [97-31341] Sufficient Record Excerpts ddl satisfied. (See Clerk's Order filed 3/16/98)

3/16/98 CLERK Order filed granting unopposed motion of State of Louisiana to file amicus brief in support of appellants Robin and Renee Free [878753-1] Copies to all counsel. [97-31341]

3/16/98 Amicus curiae brief filed by Amicus Curiae State of Louisiana in support of Appellants Robin and Renee Free. Copies of Brief: 8 # of pages: 9. Date of COS: 3/3/98 Sufficient [Y/N]: y. [97-31341] E/Res's Brief ddl updated to 4/15/98 for Mead Johnson & Co,

for Bristol Myers-Squibb, for Abbott Laboratories.

3/25/98 Appearance form filed by Jane Bishop Johnson for Amicus Curiae State of Louisiana. [97-31341]

4/16/98 Unopposed motion filed by Appellee Abbott Laboratories, Appellee Bristol Myers-Squibb, Appellee Mead Johnson & Co for leave to file brief out of time [916742-1] [97-31341]

4/16/98 Appellee's Brief filed by Appellee Abbott Laboratories, Appellee Bristol Myers-Squibb, Appellee Mead Johnson & Co. Copies of Brief: 7 # of pages: 38. Word count: 11,243 Date of COS: 4/16/98 Sufficient [Y/N]: N, proportional type too small. [97-31341] E/Res's Brief ddl satisfied. Reply Brief due on 4/30/98 for Renee Free, for Robin Free. Sufficient Brief due on 5/8/98 for Mead Johnson & Co, for Bristol Myers-Squibb, for Abbott Laboratories.

4/16/98 The attorney Douglas Dwight Broadwater for Mead Johnson & Co, attorney Douglas Dwight Broadwater for Bristol Myers-Squibb not participating in case. [97-31341]

4/17/98 CLERK Order filed granting unopposed appellees' motion to file brief out of time [916742-1] Copies to all counsel. [97-31341]

4/21/98 Extension granted by phone until: 5/8/98 to file appellant's reply brief for Appellant Robin Free, Appellant Renee Free. [97-31341]

4/22/98 Unopposed motion filed by Appellant Robin Free, Appellant Renee Free to extend time to file reply brief until 5/11/98 [932647-1] [97-31341]

4/27/98 Supplemental authorities (FRAP 28(j)) filed by Appellee Abbott Laboratories, Appellee Bristol Myers-Squibb, Appellee Mead Johnson & Co [922127-1]. [97-31341]

4/29/98 CLERK Order filed granting appellants' unopposed motion to extend time to file Reply Brief [932647-1] Reply Brief ddl updated to 5/11/98 for Renee Free, for Robin Free. Copies to all counsel. [97-31341]

4/30/98 Confirmation letter filed by Appellant Robin Free, Appellant Renee Free confirming an extension of time to and including 5/8/98 for filing brief. [97-31341] Reply Brief ddl updated to 5/8/98 for Renee Free, for Robin Free.

5/5/98 Brief made sufficient by Appellee Abbott Laboratories, Appellee Bristol Myers-Squibb, Appellee Mead Johnson & Co [97-31341] Sufficient Brief ddl satisfied.

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5/14/98 Reply brief filed by Appellant Robin Free, Appellant Renee Free. Copies of Brief: 7 # of pages: 27. Word count: 6933 Date of COS: 5/11/98 Sufficient [Y/N]: n needs grey covers, remove transparent covers. [97-31341] Reply Brief ddl satisfied. Sufficient Brief due on 5/26/98 for Renee Free, for Robin Free.

5/14/98 Brief filed in support of motion to certify questions to State Supreme Court [876418-1] by Appellant Robin Free, Renee Free Excess pgs[Y/N]?: n [939376-1] [97-31341] (Sub. to Scr. Judge and Panel)

5/26/98 Brief made sufficient by Appellant Robin Free, Appellant Renee Free [97-31341] Sufficient Brief ddl satisfied.

6/2/98 Appearance form filed by John M Landis for Appellee Mead Johnson & Co, Appellee Bristol Myers-Squibb. [97-31341]

6/19/98 Record on appeal returned to 5CCA. Volumes: 4 [97-31341]

6/25/98 COURT Order filed carrying with case appellants' motion to certify questions to State Supreme Court [876418-1] (EHJ/JES/CES) Copies to all counsel. [97-31341]

8/6/98 Case tentatively calendared for oral argument Week of: 10/05/98. [97-31341]

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8/27/98 Case calendared for oral argument. [97-31341]

9/14/98 Supplemental authorities (FRAP 28(j)) filed by Appellant Robin Free, Appellant Renee Free [1059478-1]. [97-31341]

10/2/98 Supplemental authorities (FRAP 28(j)) filed by Appellant Robin Free, Appellant Renee Free [1073767-1]. [97-31341]

10/5/98 Oral argument heard. Case argued by Daniel Adam Small for Appellant Renee Free, Appellant Robin Free, Craig A Knot for Appellee Abbott Laboratories [97-31341]

12/21/98 Supplemental authorities (FRAP 28(j)) filed by Appellant Robin Free, Appellant Renee Free [1145718-1]. [97-31341]

1/11/99 Record on appeal returned to 5CCA. Volumes: 4 Exhibits: 1 box [97-31341]

1/19/99 Non-dispositive opinion filed certifying question to LA Supreme Court. [1204704-1] Published? y # of pages: 8 Issd in T form? n Type of non-disp.: S [97-31341]

3/22/99 Louisiana Supreme Court opinion/order filed denying certification. [1235377-1] [97-31341]

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6/3/99	Opinion filed. If Published # of pages: 4 Issue Mandate due on 6/24/99. [97-31341]
6/3/99	COURT Order filed mooting in light of the opinion appellant's motion to certify questions to State Supreme Court [876418-1] (RGG,EHJ,HRD) Copies to counsel. [97-31341]
6/3/99	Judgment entered and filed. [97-31341]
6/14/99	Record on appeal filed. Exhibits: 1 box. [97-31341]
6/29/99	Mandate issued. Approved BOC Issued (Y/N)?: n [97-31341] Issue Mandate ddl satisfied.
6/29/99	Record on appeal returned to USDC. Exhibits: 2 boxes. [97-31341]
9/8/99	Supreme Court notice that petition for certiorari was filed on 09/01/99 by Appellant Robin Free, Appellant Renee Free Supct No.: 99-391 [97-31341]
11/29/99	Record on appeal returned to 5CCA. Volumes: 4 [97-31341] Case Management ddl satisfied.
11/29/99	Record on appeal returned to USDC. Volumes: 4. [97-31341]

APPENDIX C — PETITION DATED AND FILED OCTOBER 14, 1993

18TH JUDICIAL DISTRICT COURT
WEST BATON ROUGE PARISH
STATE OF LOUISIANA

ROBIN FREE AND RENEE FREE

VERSUS

ABBOTT LABORATORIES, INC.; BRISTOL-MYERS SQUIBB COMPANY; AND MEAD JOHNSON & COMPANY

NO: 25248 DIV: D

PETITION

The petition of ROBIN FREE and RENEE FREE, husband and wife, residents of and domiciled in West Baton Rouge Parish, Louisiana, appearing individually and on the behalf of all others similarly situated, respectfully represents:

1.

Made defendants herein are ABBOTT LABORATORIES, INC., a foreign corporation, with its principal place of business at Abbott Park, Illinois, authorized to do and doing business in the State of Louisiana, whose registered agent for service of process is C.T. Corporation Systems, 8550 United Plaza Boulevard, Baton Rouge, Louisiana 70809;

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Defendant, BRISTOL-MYERS SQUIBB COMPANY is a foreign corporation, not authorized to do, but doing business in the State of Louisiana, with its principal place of business located in New York, New York, and who may be served pursuant to the provisions of L.R.S. 13:3201 et seq. (Louisiana Long Arm Statute);

and, defendant, MEAD JOHNSON & COMPANY, a foreign corporation, not authorized to do, but doing business in the State of Louisiana with its principal place of business located in Evansville, Indiana, and who my be served pursuant to the provisions of L.R.S. 13:3201 et seq. (Louisiana Long Arm Statute).

2.

The American Academy of Pediatrics (the "AAP"), not named as a defendant in this complaint, has participated as a co-conspirator in the violations alleged herein, and has performed acts and made statements in furtherance thereof. The AAP is a non-profit corporation with its headquarters in Elk Grove Village, Illinois, and with chapters throughout the United States.

3.

The defendants are justly and truly indebted unto the class of plaintiffs herein for such damages as may reasonably compensate each and every class member for his\her economic loss, including teble damages, together with attorney fees, legal interest from date of judicial demand until paid, but in a total amount not to exceed $20,000.00 per class

Appendix C

member and for all cost of this litigation for the following, to wit:

4.

This is a class action law suit filed under the provisions of La. C.C.P. article 591 et seq. on behalf of consumers of infant formula in the State of Louisiana who were injured as a result of defendants' combination, contract, understanding or agreement, express or implied, in violation of L.R.S. 51:122 et seq., R.C.C. art. 2315, and R.C.C. article 1953 et seq.

5.

Plaintiffs bring this action on their own behalf on and behalf of the following class:

> All consumers who reside in the State of Louisiana and who, at any time during the period of January 1, 1980 through December 31, 1992, purchased one or more of the defendants' brands of infant formula in the State of Louisiana.

6.

Plaintiffs are entitled to have this cause of action maintained as class action, pursuant to Louisiana Code of Civil Procedure, Article 591, et seq., for, inter alia, the following reasons:

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A. The persons or entities constituting the class are so numerous that the individual joinder of all parties is impracticable;

B. The existing common character among rights sought to be enforced on behalf of the class among the class representatives and the unnamed members of the class;

C. The named plaintiffs are representatives of the class and members of the class that are so situated as to provide adequate representation for their named class members;

D. The great majority of the unnamed class members have no substantial interest in individually controlling the prosecution of their separate actions;

E. The common questions and issues of law and fact involved in this matter which predominate over questions affecting individual class members;

F. Any defenses of or theories of resistance or liabilities set forth by defendants would be applied to all plaintiffs presented by members of the class;

G. Prosecutions of separate actions by individual class members will create a serious risk of inconsistent or varying adjudications which may prejudicially affect the claims of other class members in subsequent litigation;

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H. The prosecution of separate actions by the individual class members possesses the risk that separate adjudications respecting the individual claimants would not be entirely dispositive of the interest of class members not parties to the litigation or would otherwise substantially impair or impede the ability of the class members to protect their interests;

I. The class action is a superior procedural vehicle for this litigation because the primary objectives of the class action, economies of time, effort and expense, will be achieved; and,

J. The vehicle of the class action may be more easily managed than some other procedural vehicle, considering the opportunity to afford reasonable notice of significant phases of the litigation to class members.

7.

Each of the named plaintiffs' individual damages are not substantially different from the damages of the other members of their representative class. The petitioners will fully and adequately protect the interests of the other members of the class, who are too numerous to be named individually and to individually appear in these proceedings.

8.

There is a well-defined community of interest in the questions of law and fact affecting the parties to be

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represented; the claims of the representative parties are typical of the claims applicable to the entire class; the questions of law and fact applicable to the entire class predominate over questions which may affect individual members, including, inter alia, the following:

A. Whether the defendants engaged in the combination, contract, understanding or agreement among themselves, expressed or implied, to fix, raise, maintain or stabilize prices of infant formula sold in the United States, including the State of Louisiana;

B. Whether the defendants took steps actively to conceal the combination, contract, understanding or agreement from plaintiffs and the other members of the class;

C. Whether the defendants' conduct caused retail prices of infant formula sold in the State of Louisiana to be fixed, raised, maintained or stabilized at artificially high or non-competitive levels; and,

D. Whether the plaintiffs and the other members of the class were injured by defendants' conduct and, if so, the appropriate class wide measure of damages.

These and other questions of law and fact common to the class predominate over any questions affecting only individual members of the class.

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9.

The plaintiffs are asserting claims that are typical of the claims of the entire class and plaintiffs will fairly and adequately represent and protect the interest of the class in that they have no interest antagonistic to those in the class.

10.

The plaintiffs have retained counsel who are competent and experienced in the prosecution of this type of litigation.

11.

The plaintiffs and the members of the class have all suffered irreparable harm and damage as a result of the defendants' unlawful and wrongful acts. Absent a class action, defendants will likely retain millions of dollars accrued as a result of their wrongdoing to the detriment of consumers of their infant formula products.

12.

Because of the size of the individual class members' claim, few, if any, class members could afford to seek legal action for the wrongs complained of herein. Absent a class action, the class members will continue to suffer losses and allow these violations of law to proceed without remedy and allow defendants to retain the proceeds of their ill-gotten gain.

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13.

Beginning in 1980 and continuing through 1992, the defendants and co-conspirators engaged in the continuing combination, contract, understanding and agreement, expressed or implied, in unreasonable restraint of trade in violation of L.R.S. 51:122 et seq., R.C.C. art. 2315, and R.C.C. article 1953 et seq.

14.

The aforesaid combination, contract, understanding and agreement consisted of an agreement, understanding and concert of action among defendants, the substantial terms of which were to raise, fix, maintain and stabilize at artificially high levels the wholesale prices of infant formula sold in the United States, including the State of Louisiana.

15.

For the purpose of forming and effectuating the aforesaid combination, contract, understanding and agreement the defendants and co-conspirators did those things which they combined and conspired to do.

16.

The aforesaid combination, contract, understanding and agreement had the effect, among others, of causing retail prices of infant formula purchased by plaintiff and the other members of the class to be raised, fixed, maintained and stabilized at artificially high and non-competitive levels.

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17.

Throughout the time period set forth herein, the defendants have fraudulently concealed their unlawful combination, contract, understanding and agreement from the plaintiff and the other members of the class.

18.

In order to fraudulently conceal their combination, contract, understanding and agreement from plaintiff and the other members of the class, defendants engaged, inter alia, in the following affirmative conduct:

A. Defendants secretly conducted activities in furtherance of their combination, contract, understanding and agreement.

B. Defendants communicated in furtherance of their combination, contract, understanding and agreement through means which they believed to be safe from detection and avoided means which they believed to be subject to detection, including avoiding references in documents to such combination, contract, understanding and agreement and limiting information concerning such combination, contract, understanding and agreement to a small number of defendants' key officials.

C. Defendants alternated leadership in setting infant formula prices and avoided in most instances exactly matching another's price increase.

D. Defendants imposed protective orders on documents and court files in other, related lawsuits against them.

19.

Therefore, the running of any statute of limitations has been suspended with respect to the claims alleged herein by virtue of the doctrine of contra non valentum agere nulla currit praescriptio in that (a) defendants through various devices and techniques of secrecy, described above, affirmatively and fraudulently concealed the existence of the combination, contract, understanding and agreement alleged herein; and (b) plaintiff and the other members of the class had no knowledge of such unlawful conduct or of facts which might have led to the discovery thereof with the exercise of due diligence until some time shortly before filing this petition.

20.

As a direct and proximate result of the unlawful conduct of the defendants alleged hereinabove, plaintiff and the members of the class paid more for infant formula than they would have paid in the absence of the illegal combination, contract, understanding and agreement and, as a result, have been injured and suffered damages in an amount presently undetermined.

21.

The aforesaid actions of the defendants constitute a disregard for the rights of the plaintiffs and the members of

the class, requiring an award of all damages which will reasonably compensate each member of the class for his losses and damages including treble damages under L.R.S. 51:137 and reasonable attorneys' fees, but, in a total amount not to exceed $20,000.00 per class member.

WHEREFORE, plaintiffs pray on their behalf individually, and on behalf of all others similarly situated that the defendants be cited to appear and answer this petition, and that after due proceedings had, that there be judgment entered herein as follows:

I. That an Order be entered herein and certifying this action and maintaining this action as a class action;

II. That the plaintiffs and class members herein be awarded compensatory damages in an amount to be proven at trial trebled according to L.R.S. 51:137, for each named plaintiff and for each member of the plaintiff class;

III. For such reasonable attorney fees as may be authorized by the law of the State of Louisiana, but plaintiffs hereby specifically limit each plaintiff's and each class member's total claim to an amount not exceeding $20,000.00;

IV. For all cost of this suit and for legal interest thereon from the date of the loss to each plaintiff and/or class member, or alternatively, from the date of judicial demand; and,

V. For all just and equitable relief.

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APPENDIX D — ANSWER OF ABBOTT LABORATORIES DATED APRIL 25, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 93-971

JUDGE PARKER
MAGISTRATE JUDGE RIEDLINGER

ROBIN FREE AND RENEE FREE

VS.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB CO. AND MEAD JOHNSON & CO.

ANSWER OF ABBOTT LABORATORIES

In answer to plaintiffs' complaint, Abbott Laboratories ("Abbott"), by and through its attorneys, states as follows:

1.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted against Abbott.

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2.

SECOND DEFENSE

Neither plaintiff nor any member of a purported class has suffered any compensable injury or damage as a result of Abbott's conduct.

3.

THIRD DEFENSE

Plaintiffs' claims are barred, in whole or in part, to the extent they seek damages duplicative of damages sought or to be sought in other actions.

4.

FOURTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, because any conduct engaged in by Abbott has been reasonable and justified by legitimate business and economic interests.

5.

FIFTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the applicable statutes of limitation.

6.

SIXTH DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches.

7.

SEVENTH DEFENSE

Plaintiffs lack standing to assert each and every claim set forth in the Complaint.

8.

EIGHTH DEFENSE

Plaintiffs' claims are barred in whole or in part to the extent any recovery by plaintiff would be duplicative of recovery by other plaintiffs in other lawsuits.

9.

Abbott reserves the right to add to or amend this answer and affirmative defenses at any time prior to the trial of this matter.

Pleading further, if such be necessary, and in the alternative throughout, Abbott says:

10.

Abbott admits that it is a corporation headquartered in Illinois, that it is authorized to and does in fact conduct business in Louisiana, and that C.T. Corporation Systems is its registered agent for service of process in Louisiana.

Abbott, upon information and belief, states that Bristol-Myers and Mead Johnson conduct business in Louisiana. Abbott is without sufficient knowledge to admit or deny the remaining allegations of the complaint concerning Bristol-Myers and Mead Johnson. Abbott denies the remaining allegations of paragraph 1.

11.

Abbott, upon information and belief, states that the American Academy of Pediatrics is a non-profit corporation with its headquarters in Elk Grove Village, Illinois. Abbott denies the remaining allegations of paragraph 2 of the complaint.

12.

Abbott denies the allegations of paragraph 3 of the complaint.

13.

Abbott admits that plaintiffs purport to bring this action as a class action for violations of Louisiana law but denies that this action may properly be brought as a class action

and denies that Abbott has violated any law. Abbott further denies that plaintiffs or any purported class member has suffered any injury at all and denies the remaining allegations of paragraph 4.

14.

Abbott admits that paragraph 5 purports to define a class but denies that this action may properly be brought as a class action.

15.

Abbott denies the this action may properly be brought as a class action allegations and therefore denies the allegations of paragraph 6 as a whole and the allegations of each sub-part of paragraph 6.

16.

Abbott denies the allegations of paragraph 7.

17.

Abbott denies the allegations of paragraph 8 taken as a whole and each of the sub-parts of paragraph 8.

18.

Abbott denies the allegations of paragraph 9.

19.

Abbott is without sufficient knowledge to admit or deny the allegations of paragraph 10.

20.

Abbott denies the allegations of paragraph 11.

21.

Abbott is without sufficient knowledge to admit or deny whether members of the purported class could afford to seek legal action with regard to the allegations of the complaint. Abbott denies that this action may properly be maintained as a class action, denies that the plaintiffs or purported class members have suffered any injury, denies that it has violated any lay, and denies that any of its "gains" are "ill-gotten." Abbot denies the remaining allegations of paragraph 12.

22.

Abbott denies the allegations of paragraph 13.

23.

Abbott denies the allegations of paragraph 14.

24.

Abbott denies the allegations of paragraph 15.

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25.

Abbott denies the allegations of paragraph 16.

26.

Abbott denies the allegations of paragraph 17.

27.

Abbott denies the allegations of paragraph 18 taken as a whole and denies each of paragraph 18's sub-parts.

28.

Abbott denies the allegations of paragraph 19.

29.

Abbott denies the allegations of paragraph 20.

30.

Abbott denies the allegations of paragraph 21.

31.

Abbott denies the allegations stated in plaintiffs' unnumbered "WHEREFORE" clause and states that plaintiffs are not entitled to any relief at all.

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WHEREFORE, defendant Abbott Laboratories denies that the plaintiff is entitled to any relief whatsoever and respectfully requests that the Court:

a. enter judgment in favor of defendant Abbott Laboratories, dismissing the complaint with prejudice and on the merits;

b. award defendant Abbott Laboratories its costs, disbursements, and attorney fees, as may be allowed by law; and

c. grant such further relief as the Court deems appropriate.

Dated: April 25, 1995

Respectfully Submitted,

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APPENDIX E — ANSWER OF DEFENDANTS BRISTOL-MYERS SQUIBB COMPANY AND MEAD JOHNSON & COMPANY DATED APRIL 26, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Civil Action

No. 93-971

Div. A-M1

JUDGE PARKER
MAGISTRATE RIEDLINGER

ROBIN FREE, RENEE FREE,

Plaintiffs,

– against –

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB COMPANY, MEAD JOHNSON & COMPANY,

Defendants.

ANSWER OF DEFENDANTS BRISTOL-MYERS SQUIBB COMPANY AND MEAD JOHNSON & COMPANY

COME NOW defendants Bristol-Myers Squibb Company ("Bristol-Myers") and Mead Johnson & Company ("Mead Johnson"), severing themselves from their

co-defendant, and appearing for themselves alone, to answer the petition of plaintiffs Robin and Renee Free (the "Petition") and admit, deny and allege as follows:

1.

With respect to paragraph 1 of the Petition, admit, upon information and belief, that defendant Abbott Laboratories ("Abbott") is an Illinois corporation with its principal place of business in Abbott Park, Illinois; state that they are without knowledge or information sufficient to form a belief as to whether Abbott is authorized to do business in the State of Louisiana; state that they are without knowledge or information sufficient to form a belief as to the identity of Abbott's registered agent for service of process in Louisiana, if any; admit that Bristol-Myers is a foreign corporation with its principal place of business in New York, New York; admit that Bristol-Myers is not authorized to do business in Louisiana; admit that Bristol-Myers' products are sold and distributed in Louisiana; admit that Mead Johnson & Company is a foreign corporation with its principal place of business in Evansville, Indiana; admit that Mead Johnson is not authorized to do business in Louisiana; admit that Mead Johnson's products are sold and distributed in Louisiana; and, except as expressly so stated and admitted, deny each and every remaining allegation contained therein.

2.

With respect to paragraph 2 of the Petition, admit that plaintiffs purport to refer to the American Academy of Pediatrics as the "AAP"; admit, upon information and belief,

that the American Academy of Pediatrics ("AAP") is a non-profit corporation with its headquarters in Elk Grove Village, Illinois, and with chapters elsewhere; admit that the AAP is not named as a defendant in the Petition; and, except as expressly so admitted, deny each and every remaining allegation contained therein.

3.

With respect to paragraph 3 of the Petition, deny that plaintiffs or any member of the purported class they seek to represent have suffered any damages as a result of defendants' conduct and deny each and every remaining allegation contained therein.

4.

With respect to paragraph 4 of the Petition, admit that plaintiffs purport to bring this action on behalf of themselves and an alleged class as defined in paragraph 4 of the Petition pursuant to La. Code Civ. Pro. article 591 *et seq.*; deny that this action may properly be maintained as a class action; deny that plaintiffs or any member of the purported class they seek to represent have suffered any damages as a result of defendants' conduct and deny each and every remaining allegation contained therein.

5.

With respect to paragraph 5 of the Petition, deny that this action may properly be maintained as a class action and deny each and every remaining allegation contained therein.

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6.

With respect to paragraph 6 of the Petition, state that they are without knowledge or information sufficient to form a belief as to the truth of the allegation regarding plaintiffs' knowledge of the exact size of the class; deny that this action may properly be maintained as a class action; state that each and every remaining allegation contained in paragraph 6 is a conclusion of law for which no response is required; nonetheless, except as expressly so stated, deny each and every remaining allegation contained therein.

7.

With respect to paragraph 7 of the Petition, deny that this action may properly be maintained as a class action; state that each and every allegation contained in paragraph 7 is a conclusion of law for which no response is required; nonetheless, deny each and every allegation contained therein.

8.

With respect to paragraph 8 of the Petition, deny that this action may properly be maintained as a class action; state that each and every allegation contained in paragraph 8 is a conclusion of law for which no response is required; nonetheless, deny each and every allegation contained therein.

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9.

With respect to paragraph 9 of the Petition, deny that this action may properly be maintained as a class action; state that each and every allegation contained in paragraph 9 is a conclusion of law for which no response is required; nonetheless, deny each and every allegation contained therein.

10.

With respect to paragraph 10 of the Petition, deny that this action may properly be maintained as a class action; and state that they are without knowledge or information sufficient to form a belief as to the allegations that plaintiffs have retained competent counsel experienced in the prosecution of this type of litigation.

11.

With respect to paragraph 11 of the Petition, deny that plaintiffs or any member of the purported class they seek to represent have suffered any damages as a result of defendants' conduct; deny that this action may properly be maintained as a class action; and deny each and every remaining allegation contained therein.

12.

With respect to paragraph 12 of the Petition, deny that plaintiffs or any member of the purported class they seek to represent have suffered any damages as a result of

defendants' conduct; deny that this action may properly be maintained as a class action; and deny each and every remaining allegation contained therein.

13.

With respect to paragraph 13 of the Petition, deny each and every allegation contained therein.

14.

With respect to paragraph 14 of the Petition, deny each and every allegation contained therein.

15.

With respect to paragraph 15 of the Petition, deny each and every allegation contained therein.

16.

With respect to paragraph 16 of the Petition, deny each and every allegation contained therein.

17.

With respect to paragraph 17 of the Petition, deny each and every allegation contained therein.

18.

With respect to paragraph 18 of the Petition, deny each and every allegation contained therein.

19.

With respect to paragraph 19 of the Petition, state that each and every allegation contained in paragraph 19 is a conclusion of law for which no response is required; nonetheless, deny each and every allegation contained therein.

20.

With respect to paragraph 20 of the Petition, deny each and every allegation contained therein.

21.

With respect to paragraph 21 of the Petition, deny that plaintiffs or any member of the purported class they seek to represent have suffered any damages as a result of defendants' conduct and deny each and every remaining allegation contained therein.

AFFIRMATIVE DEFENSES

22.

The Petition fails to state a claim upon which relief can be granted against these defendants.

23.

This action is not properly maintainable as a class action.

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24.

Plaintiffs are not proper class representatives.

25.

The damages sought by plaintiffs on behalf of the purported class cannot be recovered without specific proof by each alleged class member that he or she has been injured.

26.

There has been no class-wide injury or damage.

27.

Neither plaintiffs nor any purported class member have suffered any compensable injury or damage as a result of defendants' conduct.

28.

Plaintiffs' claims are barred, in whole or in part, to the extent they seek damages duplicative of damages sought or to be sought in other actions.

29.

Plaintiffs' claims are barred, in whole or in part, because any conduct engaged in by defendants has been reasonable and justified by legitimate business and economic interests.

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30.

Plaintiffs' claims are barred, in whole or in part, by prescription, the applicable statutes of limitation, or by the doctrine of laches.

31.

The Petition fails to plead fraudulent concealment or contra non valentum with the requisite particularity.

32.

With respect to paragraph 18(d) of the Petition, the actions alleged are protected by the First Amendment of the U.S. Constitution and the *Noerr-Pennington* doctrine.

33.

Plaintiffs lack standing to assert each and every claim set forth in the Petition.

34.

Because of the corporate relationship between defendants Bristol-Myers and Mead Johnson, no agreement between them can constitute an unlawful conspiracy.

35.

To the extent that any recovery by plaintiffs or by members of the purported class would be duplicative of

recovery by other plaintiffs in other lawsuits, subjecting Bristol-Myers and Mead Johnson to the possibility of multiple recovery, such recovery is barred by the Eighth Amendment to the U.S. Constitution, made applicable to the States through the Fourteenth Amendment, and also violates Bristol-Myers' and Mead Johnson's right to substantive and procedural due process.

36.

The injunction sought by plaintiffs is moot.

37.

Bristol-Myers and Mead Johnson reserve the right to add to or amend this answer and affirmative defenses at any time prior to the trial of this matter.

WHEREFORE, Bristol-Myers Squibb Company and Mead Johnson & Company demand judgment dismissing the Petition as against them and awarding them costs and expenses of this action, including reasonable attorneys' fees, and such other relief as this Court deems just and proper.

Respectfully,

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Jan 13 2000

Supreme Court, U.S.
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JAN 13 2000
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No. 99-391

IN THE

Supreme Court of the United States

ROBIN FREE and RENEE FREE,

Petitioners,

v.

ABBOTT LABORATORIES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, overrules *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), and thus expands federal subject matter jurisdiction in a class action to encompass class members whose claims do not satisfy the amount-in-controversy requirement of 28 U.S.C. § 1332, as long as diversity jurisdiction exists over the claims of one named plaintiff.

PARTIES TO THE PROCEEDING

The Petitioners are Robin Free and Renee Free, plaintiffs in the action originally filed in Louisiana state court and removed by the Respondents to federal district court.

The Respondents are the defendants in the action below: Abbott Laboratories, Bristol-Myers Squibb Company, and Mead Johnson & Company.

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OPINIONS BELOW

The initial opinion of the Court of Appeals on the jurisdictional issue presented is reported at 51 F.3d 524 and is reprinted as Appendix J to the Petition ("Pet. App." J). The subsequent opinion of the Court of Appeals on the issue is reported at 164 F.3d 270, and is reprinted as Pet. App. C. The opinion of the Court of Appeals affirming dismissal is reported at 176 F.3d 298, and is reprinted as Pet. App. A.

The District Court's initial opinion on jurisdiction is reported at 1994 U.S. Dist. LEXIS 4563, and reprinted as Pet. App. L. The District Court's denial of reconsideration of the jurisdictional issue is reported at 1994 WL 422298 and is reprinted at Pet. App. K.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1999. Pet. App. 1a. A Petition for Writ of Certiorari was timely filed on September 1, 1999. The Petition was granted on November 29, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1367 (1994) provides in part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section

1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

* * *

28 U.S.C. § 1332 provides in part:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

STATEMENT OF THE CASE

Petitioners Robin and Renee Free (the "Frees") are retail purchasers of infant formula. J.A. 48a. They filed a class action petition on October 14, 1993 in the Eighteenth Judicial District Court of the State of Louisiana against infant formula manufacturers Abbott Laboratories, Bristol-Myers Squibb Company, and Mead Johnson & Company (collectively, "defendants"). J.A. 39a. The Frees allege that the defendants conspired to raise the price of infant formula in violation of the Louisiana antitrust statute and other state law; no federal claims are presented. Pet. App. 77a; J.A. 46a. They claim that, as a result of defendants' conduct, retail purchasers of infant formula in Louisiana paid higher prices than they otherwise would have paid. J.A. 46a; Pet. App. 77a. The petition seeks relief on behalf of themselves and a class of purchasers in an amount not to exceed $20,000 each. J.A. 40-41a, 48-49a. The defendants answered the petition and denied all relevant allegations. J.A. 52-59a.

The defendants removed the action to the United States District Court for the Middle District of Louisiana, alleging diversity and federal question jurisdiction. The Frees moved for remand to Louisiana state court, arguing that neither their claims nor the claims of unnamed class members satisfied the then-applicable $50,000 matter-in-controversy requirement of

diversity jurisdiction and that there was no federal question jurisdiction. See 28 U.S.C. § 1332(a), Pet. App. 106a. The district court held there was no federal question jurisdiction. Pet. App. 103a. It did, however, determine that the matter-in-controversy requirement of Section 1332 was met for the Frees' claims because their status as the named plaintiffs in a class action could entitle them to an individual award of attorney's fees under the terms of Article 595 of the Louisiana Code of Civil Procedure.[1] Pet. App. 104a. The district court then held that 28 U.S.C. § 1367 permitted it to exercise supplemental jurisdiction over the claims of the unnamed class members, none of which satisfy the matter-in-controversy requirement of 28 U.S.C. § 1332(a). Pet. App. 104a. However, acting under Section 1367(c), the district court declined to exercise supplemental jurisdiction because the action presented novel issues of state law. Pet. App. 104a-05a. With respect to the named plaintiffs, the district court declined jurisdiction under an abstention doctrine. Pet. App. 95a-97a.

Defendants took an interlocutory appeal of the remand order. The Frees again argued that their claims do not exceed the jurisdictional minimum and further that federal supplemental jurisdiction under 28 U.S.C. § 1367 does not encompass class members whose claims do not satisfy the jurisdictional minimum. The Fifth Circuit held that the Frees' claims satisfy the jurisdictional minimum because of their entitlement to Article 595 attorney's fees. Pet. App. 82a. The Fifth Circuit then held that the line of cases culminating in *Zahn* was overruled by Section 1367 and therefore affirmed supplemental jurisdiction over unnamed class members even though their claims do not satisfy the jurisdictional minimum. Pet. App. 89a. Finally, the court reversed the district court's decision to abstain

1. Article 595 states: "The court may allow the representative parties their reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or a recovery or compromise is had which is beneficial, to the class." Pet. App. 79-80a.

with respect to the Frees' claims and held that to decline supplemental jurisdiction under Section 1367(c) with respect to the unnamed class members was an abuse of discretion. Pet. App. 90-91a. In light of its holdings on diversity and supplemental jurisdiction, the Fifth Circuit declined to address the federal question issue. The Frees sought rehearing and rehearing en banc; both requests were denied. Pet. App. 75a.

When the action returned to federal district court, two defendants moved to dismiss based on Louisiana antitrust law. Prior to a ruling on the motion, all defendants agreed to settle the case for $4.35 million. Pet. App. 55a. The district court preliminarily approved the settlement and certified a settlement class. Pet. App. 66-73a. However, following notice to the class and a hearing, the court declined to grant final settlement approval. Pet. App. 65a. Defendants moved for reconsideration of the denial of settlement approval; the motion was denied. Pet. App. 52a. The third defendant then joined the pending motion to dismiss. The district court determined that Louisiana state antitrust law does not permit damages actions by indirect purchasers and ordered the action dismissed for failure to state a claim. Pet. App. 44a.

The Frees appealed the dismissal and continued to assert the lack of federal subject matter jurisdiction over this action because of failure to satisfy the matter-in-controversy requirement. On January 19, 1999, a new three-judge panel of the Fifth Circuit ruled that, under the law of the case doctrine, it would not consider further the issue of subject matter jurisdiction. Pet. App. 15a. The Fifth Circuit then certified two questions of state antitrust law to the Louisiana Supreme Court, including the question of whether Louisiana state law permits actions for antitrust damages by indirect purchasers. Pet. App. 24-25a. On March 19, 1999, the Louisiana Supreme Court denied certification. Pet. App. 9a. On June 3, 1999, the Fifth Circuit predicted that Louisiana law would not permit antitrust damages actions by indirect purchasers, and affirmed the district

court's dismissal of the action. Pet. App. 8a. The Frees sought certiorari to review the Fifth Circuit's determination that the district court had subject matter jurisdiction over this action when the district court entered its order of dismissal. The Petition for Writ of Certiorari was filed on September 1, 1999. This Court granted certiorari on November 29,1999. *Free v. Abbott Labs,* 120 S. Ct. 525 (U.S. 1999).

SUMMARY OF ARGUMENT

There can be no legitimate dispute that Congress *actually and specifically intended* the supplemental jurisdiction statute, 28 U.S.C. § 1367, to preserve the well-established rule that federal courts do not have original jurisdiction over state-law multi-plaintiff actions (including class actions) unless each and every plaintiff in the action has claims that satisfy the matter-in-controversy requirement of 28 U.S.C. § 1332(a). Congress's intent in this regard is clear, and none of the circuit courts that have examined congressional intent have found otherwise. Thus, the central question presented by this case is whether the language of Section 1367 requires this Court to disregard Congress's unmistakable intent. It does not. This Court's longstanding interpretations of the matter-in-controversy requirement in multi-plaintiff diversity actions, including *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), remain good law.

Section 1367 grants federal district courts supplemental jurisdiction over certain claims (hereafter, "supplemental claims") that are outside the courts' original jurisdiction. However, by its terms, Section 1367 grants supplemental jurisdiction only when there first is a "civil action of which the district courts have original jurisdiction." 28 U.S.C. § 1367(a). Section 1367 *supplements* other conferrals of original jurisdiction that go only so far. It does not alter original jurisdiction by overriding original jurisdiction requirements.

A long-established requirement of original jurisdiction in diversity cases arises in multi-plaintiff actions. In decisions

dating back to the early nineteenth century, this Court has consistently held that the phrase "matter in controversy" means that the claims of each and every plaintiff in an action must satisfy the jurisdictional minimum (hereafter, the "matter-in-controversy rule"). This rule, which Congress has relied on for over a century, purposefully limits federal courts' intrusion into state court authority and ensures that state-law claims do not so swamp the federal judiciary that it becomes unable to provide federal question litigants with timely justice.

Nevertheless, the Fifth Circuit disregarded the matter-in-controversy rule in concluding that the class representatives' claims in this action are within the district court's diversity jurisdiction, even though it is undisputed that none of the absent class members have claims that satisfy the jurisdictional minimum. The Fifth Circuit erred because the matter-in-controversy rule, which requires *all* plaintiffs in the action (or class members in a class action) to have jurisdictionally-sufficient claims, necessarily is incompatible with an exercise of supplemental jurisdiction over plaintiffs (or class members) with jurisdictionally-insufficient claims.

Similar incompatibilities do not arise in other jurisdictional contexts. For example, the requirement of 28 U.S.C. § 1331, that a civil action arise under federal law is satisfied by the presence of a federal claim, *whether or not* the action also contains a state-law claim. Therefore, in federal question cases, Section 1367's original jurisdiction requirement is not defeated by using supplemental jurisdiction to include otherwise jurisdictionally-deficient claims. It is the nature of the matter-in-controversy rule, requiring *all* plaintiffs in a multi-plaintiff diversity action to have claims in the requisite amount, that leaves no opportunity for any plaintiff in the action to seek access to the federal courts through supplemental jurisdiction.

Applying Section 1367 to the facts of this case is straightforward. None of the absent class members have claims that satisfy the jurisdictional minimum. The matter-in-controversy requirement of diversity jurisdiction, therefore, is

not satisfied. With this element of the diversity statute unfulfilled, the district court does not have original jurisdiction over this action. Absent original jurisdiction, the district court may not exercise supplemental jurisdiction under Section 1367.

All of the other evidence of congressional intent confirms that this analysis is correct. Both Section 1367(b) and the legislative history make it absolutely clear that Congress did not intend Section 1367(a) to abrogate the matter-in-controversy rule.

Section 1367(b) applies to diversity-only cases and prohibits the exercise of supplemental jurisdiction in certain enumerated circumstances where the exercise of such jurisdiction "would be inconsistent with the jurisdictional requirements of section 1332." 28 U.S.C. § 1367(b). Specifically, Section 1367(b) eliminates supplemental jurisdiction over the claims of potential plaintiffs who seek to join an existing action under Federal Rule of Civil Procedure 19 or to intervene pursuant to Rule 24, but whose presence would destroy diversity jurisdiction. 28 U.S.C. § 1367(b). This restriction on the exercise of supplemental jurisdiction would be largely meaningless, however, if Section 1367(a) were construed, as it was by the Fifth Circuit, to grant supplemental jurisdiction over such claims if the same persons joined the litigation at the outset under Rule 20.

Section 1367(b) also eliminates supplemental jurisdiction over claims that do not satisfy diversity requirements by plaintiffs against parties added to an existing action under Rules 14, 19, 20 or 24. This further limitation on supplemental jurisdiction also cannot be reconciled with the Fifth Circuit's interpretation of Section 1367(a) as opening the federal courts to multi-plaintiff diversity actions. Section 1367(b)'s clear purpose to preserve the requirements of diversity jurisdiction in several situations where parties are added or proposed to be added to the litigation only makes sense if Section 1367(a) does not abrogate the matter-in-controversy rule.

Moreover, what the language of Section 1367(b) strongly suggests the legislative history conclusively establishes. Congress understood the matter-in-controversy rule to state a fundamental requirement of original jurisdiction in diversity cases and unmistakably intended to leave that requirement in place. There is not a shred of evidence in the legislative history to the contrary. Indeed, the legislative history is devoid of any comment suggesting that any legislator intended the supplemental jurisdiction statute not merely to add to existing statutory grants of jurisdiction, but to abrogate important requirements of those existing grants such as the matter-in-controversy rule.

The Court must give effect to congressional intent — expressed in the language, structure, and purpose of Section 1367 and in reliable and compelling legislative history — to maintain the current requirements of diversity jurisdiction and prevent federal courts from undermining the state courts' traditional role in developing and interpreting state law. Congressional policy limiting diversity jurisdiction has continued unchanged for over 150 years, and it is clear that Congress did not intend Section 1367 to change that course.

ARGUMENT

I. SECTION 1367(a) LEAVES THE REQUIREMENTS OF ORIGINAL JURISDICTION UNDISTURBED.

A. Section 1367(a) Requires That A Federal Court First Have Original Jurisdiction Over A Civil Action Before Exercising Supplemental Jurisdiction Over Supplemental Claims.

The supplemental jurisdiction statute, 28 U.S.C. § 1367, permits a district court that has original jurisdiction of a civil action to exercise supplemental jurisdiction over certain claims that are outside the court's original jurisdiction. 28 U.S.C.

§ 1367(a).[2] However, by its terms, Section 1367 grants only "supplemental" jurisdiction and requires that there first be a "civil action of which the district courts have original jurisdiction." 28 U.S.C. § 1367(a). This requirement codifies the well-established rule that the district courts first must have original jurisdiction of a civil action before exercising supplemental jurisdiction over pendent or ancillary claims. *See Peacock v. Thomas*, 516 U.S. 349, 355 (1996); *Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). Thus, under Section 1367, as before, the first step in deciding whether supplemental jurisdiction is available is determining whether the civil action is within the district court's original jurisdiction. *See Chicago v. International College of Surgeons*, 522 U.S. 156, 166 (1997); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 531 (1995).

2. Section 1367(a) states:

> Except as expressly provided in subsections (b) and (c) or as expressly provided otherwise by federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action that they form part of the same case or controversy under Article III of the Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367(a).

Section 1367(b), quoted and discussed in detail in Sections II. A & B, *infra*, creates a number of exceptions to the grant of supplemental jurisdiction in Section 1367(a) aimed at preventing plaintiffs in a diversity case from using supplemental jurisdiction after an action has been filed to undercut the original jurisdiction requirements of 28 U.S.C. § 1332. 28 U.S.C. § 1367(b)

Section 1367(c) sets forth a number of discretionary reasons a district court may decline to exercise supplemental jurisdiction. It is quoted in full at p. 2, *supra*. 28 U.S.C. § 1367(c).

The availability of original jurisdiction is determined by reference to the relevant original jurisdiction statutes and the case law interpreting them. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (federal courts "possess only that power authorized by Constitution and statute"); *Chicago*, 522 U.S. at 163-64 (finding original jurisdiction under 28 U.S.C. § 1331 and relevant case law and then exercising supplemental jurisdiction under Section 1367); *Grubart*, 513 U.S. at 532-548 (finding original jurisdiction under admiralty jurisdiction statute and applicable case law and then exercising supplemental jurisdiction under Section 1367). If an action is not within a statutory grant of original jurisdiction, Section 1367 grants no supplemental jurisdiction.

B. Section 1367(a) Does Not Abrogate Original Jurisdiction Requirements.

Supplemental jurisdiction granted by Section 1367 does not change the requirements of original jurisdiction, including diversity jurisdiction. 28 U.S.C. § 1367(a).[3] Original jurisdiction analysis is the same whether the existence of original jurisdiction is being examined alone or to determine whether the prerequisite to the exercise of supplemental jurisdiction is satisfied. *See id.* Both the nature of the jurisdiction granted by Section 1367 and the statute's language support this conclusion.[4]

First, Section 1367 *supplements* the jurisdiction Congress granted in the original jurisdiction statutes. That is, Section 1367 adds to otherwise-conferred federal jurisdiction by codifying ancillary and pendent jurisdiction, *Chicago*, 522 U.S. at 165, but it does *not* abrogate original jurisdiction requirements. There is no reason to think that Section 1367's grant of supplemental

3. Indeed, as discussed in Part IV.A, *infra*, the legislative history specifically states that Congress did not intend Section 1367 to alter original jurisdiction concepts.

4. *See generally* James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case For A Sympathetic Textualism*, 148 U. Pa. L. Rev. Vol. 109 (1999).

jurisdiction, which operates in a separate sphere of jurisdiction from original jurisdiction, alters such otherwise-established requirements of original jurisdiction.

Second, the term "civil action," used by Section 1367 to describe the matter over which the district court must have original jurisdiction, is the same term that pervades the original jurisdiction statutes, including the federal question and diversity statutes. *See, e.g.*, 28 U.S.C. § 1331 (granting the district courts original jurisdiction of all "civil actions" arising under federal law); 28 U.S.C. § 1332(a)(1) (granting the district courts original jurisdiction over all "civil actions" between citizens of different states where the matter in controversy exceeds $75,000). This language shows that Section 1367's requirement of original jurisdiction is co-extensive with the grants of original jurisdiction found in Sections 1331 and 1332 (and most of the other original jurisdiction statutes), and makes it clear that Congress intended Section 1367's original jurisdiction analysis to proceed as if original jurisdiction were being examined independently of Section 1367. That is the analysis this Court has undertaken when applying Section 1367's original jurisdiction prerequisite. *See Chicago*, 522 U.S. at 163-64; *Grubart*, 513 U.S. at 532-48.

Thus, whether original jurisdiction exists for purposes of the exercise of supplemental jurisdiction under Section 1367 is purely a question of construing and applying the relevant original jurisdiction statute and case law. The Fifth Circuit erred in applying Section 1367 because it misunderstood the nature of the matter-in-controversy requirement of 28 U.S.C. § 1332(a) as long construed in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), and its forebears.

II. UNDER THE MATTER-IN-CONTROVERSY RULE, WHICH FURTHERS CONGRESS'S LONG-STANDING POLICY OF LIMITING DIVERSITY JURISDICTION, THE DISTRICT COURT LACKS ORIGINAL JURISDICTION OVER THIS ENTIRE CIVIL ACTION.

A. In A Multi-Plaintiff Action, The Diversity Statute Requires That The Claims Of Each Plaintiff Satisfy The Matter-In-Controversy Rule.

There is no dispute that this civil action is within the original jurisdiction of the district court only if the requirements of the diversity jurisdiction statute are satisfied. Under the terms of that statute, district courts have "original jurisdiction" over a "civil action" only when the action is between "citizens of different states" and the "matter in controversy" exceeds a certain sum, set at $50,000 when this case was filed. 28 U.S.C. § 1332(a)(1) (1993). If any of the statute's requirements are not met, the entire civil action is outside the district court's diversity jurisdiction. *See Zahn*, 414 U.S. at 292; *Snyder v. Harris*, 394 U.S. 332, 336 (1969); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373-74 (1978); *Strawbridge v. Curtiss*, 3 Cranch (7 U.S.) 267 (1806).

In this case, the critical original jurisdiction issue involves the "matter in controversy" requirement. This Court repeatedly has held that in a multi-plaintiff diversity action the phrase "matter in controversy" means that the claims of each plaintiff must satisfy the jurisdictional minimum. *See Zahn*, 414 U.S. at 300-01; *Snyder*, 394 U.S. at 336-37; *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589 (1939); *Pinel v. Pinel*, 240 U.S. 594, 596 (1916); *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911).

The matter-in-controversy rule was applied in *Zahn* to the same basic jurisdictional facts that exist in this case. In *Zahn*, the claims of the representative plaintiffs satisfied the jurisdictional minimum, but the claims of many of the absent

class members did not. *Zahn*, 414 U.S. at 292. The plaintiffs, who filed the case in federal court, argued that because diversity jurisdiction purportedly existed over the claims of the class representatives, the district court could exercise ancillary jurisdiction over the claims of absent class members that did not satisfy the jurisdictional minimum. *Id.* at 305 (Brennan, J., dissenting). The Court did not directly address this ancillary jurisdiction argument, deciding the case based instead on the matter-in-controversy rule. *Id.* at 300-01.

The Court began its analysis in *Zahn* with the language of Section 1332(a), stating that "suits between citizens of different states are maintainable in the district courts only if the 'matter in controversy' exceeds the statutory minimum, now set at $10,000. 28 U.S.C. § 1332(a)." *Id.* at 292-93. The Court then stated its longstanding interpretation of the matter-in-controversy requirement in multi-plaintiff cases:

> When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount. . . .

Id. at 294. The Court noted that this rule was "firmly rooted in prior cases dating from 1832, and ha[s] continued to be the accepted construction of the controlling statutes, now §§ 1331 and 1332." *Id.* at 294-95.

This same rule, the Court observed in *Zahn*, "[was] applied to class actions contemplated by Fed. Rule Civ. Proc. 23." *Id.* at 296. The Court continued with a full discussion of *Snyder v. Harris*, 394 U.S. 332 (1969), the case where, "[t]he meaning of the 'matter in controversy' language of § 1332 as it applied to class actions under Rule 23 reached this Court. . . ." *Zahn*, 414 U.S. at 298. Unlike in *Zahn*, none of the class representatives and none of the absent class members in *Snyder* asserted claims above the jurisdictional minimum. Significantly, the Court in *Zahn* did not find this difference to be material:

> None of the plaintiffs in *Snyder v. Harris* alleged a claim exceeding $10,000, but there is no doubt that *the rationale of that case controls this one*. As previously indicated, *Snyder* invoked the well-established rule that each of several plaintiffs asserting separate and distinct claims must satisfy the jurisdictional-amount requirement if his claim is to survive a motion to dismiss. *The rule* plainly mandates not only that there be no aggregation and that the entire case must be dismissed where none of the plaintiffs claims more than $10,000 but also *requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims*.

Id. at 300 (emphasis added). Thus, it was the matter-in-controversy rule (and nothing else) that required the dismissal of jurisdictionally-insufficient claims in *Zahn*. The Court gave no reason, other than that rule, for implicitly rejecting the plaintiffs' invitation to exercise ancillary jurisdiction.

B. The Matter-In-Controversy Rule Precludes The Exercise of Supplemental Jurisdiction Over The Claims Of Any Plaintiff In A Multi-Plaintiff Diversity Action.

That this Court in *Zahn* relied solely on the matter-in-controversy rule to decide the case is significant here. The rule was dispositive in *Zahn* because the rule was understood as a declaration by Congress that the federal courts shall not have jurisdiction, based only on diversity, where the claims of any plaintiff in a multi-plaintiff diversity action do not meet the matter-in-controversy threshold. Because the matter-in-controversy rule applies to *each and every* plaintiff in a multi-plaintiff action, an exercise of supplemental jurisdiction over the jurisdictionally-insufficient claims of any plaintiff necessarily would defeat the rule. The rule simply is not satisfied

if any plaintiff with claims for less than the jurisdictional minimum is in the action.

The nature of the matter-in-controversy rule differentiates it from other original jurisdiction requirements in terms of how they interrelate with supplemental jurisdiction. For example, the requirement of 28 U.S.C. § 1331 that the civil action arise under federal law is satisfied by the presence of a federal claim, *whether or not* the action also contains a state-law claim. *Chicago*, 522 U.S. at 166 (in federal question cases, "federal claims suffice to make the actions 'civil actions' within the 'original jurisdiction' of the district court for purposes of removal" and the "presence of related state law claims" does not alter this analysis). Similarly, the requirement of 28 U.S.C. § 1346 that the United States be a defendant in the action is satisfied as long as the action includes the United States as a defendant, *whether or not* other defendants also are sued. In both of these examples, an exercise of supplemental jurisdiction over the claims outside the district court's original jurisdiction would not defeat the original jurisdiction requirement. In contrast, an exercise of supplemental jurisdiction over the absent class members in this case necessarily would defeat the original jurisdiction requirement that each and every plaintiff in the action has claims exceeding the jurisdictional minimum.

In contravention of the matter-in-controversy rule, the Fifth Circuit implicitly held that this civil action was within the district court's original jurisdiction even though none of the absent class members have claims that satisfy the jurisdictional minimum. This misapplication of the rule led the Fifth Circuit to err in concluding that Section 1367 confers supplemental jurisdiction over the claims of the absent class members.

C. Absent A Clear Statement Of Congressional Intent To Abrogate The Matter-In-Controversy Rule, Section 1367 Should Be Read To Preserve The Rule.

Congressional policy for over a century has been to narrow the reach of diversity jurisdiction. *See Snyder*, 394 U.S. at 339.

This has been accomplished directly, by raising the matter-in-controversy requirement from time to time,[5] and indirectly, by acquiescing in the numerous rulings of this Court restrictively interpreting the "matter-in-controversy" requirement of Section 1332. *See id.* Congress has accepted the matter-in-controversy rule for so long that this Court has stated that the requirement is to be viewed as more than a judge-made doctrine:

> Congress has thus consistently amended the amount-in-controversy section and re-enacted the "matter in controversy" language without change of its jurisdictional effect against a background of judicial interpretation that has consistently interpreted that congressionally enacted phrase as not encompassing the aggregation of separate and distinct claims.
>
> * * *
>
> [T]he settled judicial interpretation of "amount in controversy" was implicitly taken into account by the relevant congressional committees in determining, in 1958, the extent to which the jurisdictional amount should be raised. . . . Where Congress has consistently re-enacted its prior statutory language for more than a century and a half in the face of a settled interpretation of that language, it is perhaps not entirely realistic to designate the resulting rule a "judge made formula."

Id.; *cf. Kroger*, 437 U.S. at 374 (finding that the longevity of the complete diversity rule "clearly demonstrates a congressional mandate" for the rule).

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5. For example, in 1989, the year before Section 1367's enactment, Congress increased the matter-in-controversy requirement from $10,000 to $50,000, to reduce the number of diversity cases in the federal courts (and to take into account the effects of inflation since 1958). H.R. Rep. No. 100-889 (1988), *reprinted in* 1989 U.S.C.C.A.N. 5982, 6005-6006 (estimating a 40% reduction in diversity caseload from increase in jurisdictional minimum).

The congressional policy of limiting diversity jurisdiction ensures that the federal docket does not become so overloaded with state-law cases that reasonably prompt access to federal courts in federal question cases is no longer a practical possibility:

> [T]o overrule the aggregation doctrine at this late date would run counter to the congressional purpose in steadily increasing through the years the jurisdictional amount requirement. That purpose was to check, to some degree, the rising caseload of the federal courts, especially with regard to the federal courts' diversity of citizenship jurisdiction.

Snyder, 394 U.S. at 339-40. In light of Congress's policy of limiting diversity jurisdiction, this Court should not infer, unless a contrary intention is clear, that Section 1367 expands diversity jurisdiction by abrogating the well-established matter-in-controversy requirement. *Zahn*, 414 U.S. at 302; *see Snyder,* 394 U.S. at 339.

This is especially true because Congress's policy of limiting diversity jurisdiction protects state sovereignty against the inevitable encroachment that would result from an increase in the number of diversity cases in federal court. *See Snyder*, 394 U.S. at 340 ("'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [Section 1332] has defined.'") (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)). Important principles of federalism also require that Congress make its intention " 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Court has held that

> [t]his plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme,

> powers with which Congress does not readily interfere.

Gregory v. Ashcroft, 501 U.S. 452, 461 (1991). The plain statement rule is further justified as a principle of judicial restraint in situations where "the courts themselves must decide whether their own jurisdiction has been expanded" and thus "we rely only on the clearest indications in holding that Congress has enhanced our power." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985).

Here, neither Section 1367 nor its legislative history offers any statement of congressional intent to increase the number or magnitude of diversity cases in federal court.[6] Because any weakening of the matter-in-controversy rule at this late date would upset settled jurisdictional law, would contravene longstanding congressional policy to limit diversity jurisdiction, would burden the federal courts with a heavier diversity docket, and would encroach upon state sovereignty, this Court should be chary to read Section 1367 to diminish the rule's vitality.

III. THE LANGUAGE, PURPOSE, AND OPERATION OF SECTION 1367(b) STRONGLY SUGGEST THAT CONGRESS INTENDED TO LEAVE THE MATTER-IN-CONTROVERSY RULE INTACT.

Section 1367(b) strongly indicates that Congress did not intend to abrogate the matter-in-controversy rule and confirms that Congress continued to understand that rule as a well-established preclusion of federal court authority that would otherwise displace state court power. Section 1367(b) sets forth a number of limitations on the exercise of supplemental jurisdiction in a diversity action that are inconsistent with an intent to broadly expand the scope of diversity cases by circumventing the matter-in-controversy

6. In fact, Congress's contrary intention could not be more clearly expressed in the legislative history to Section 1367. *See infra* at Part IV.A.

rule. Further, if Section 1367(a)'s jurisdictional grant were read to override the rule, the operation of Section 1367(b) would create absurd results, detailed below, that Congress could not possibly have intended. By contrast, if the matter-in-controversy rule is left intact, then Section 1367(b) codifies, with only slight changes,[7] the pre-existing jurisdictional scheme that essentially prohibited the use of ancillary jurisdiction in diversity actions to circumvent Section 1332's original jurisdiction requirements.

A. The Purpose Of Section 1367(b) Is To Prevent Parties, After The Action Has Commenced, From Invoking Supplemental Jurisdiction Over Claims They Could Not Have Asserted, Consistent With Diversity Jurisdiction Requirements, At The Outset.

Section 1367(b) provides that where original jurisdiction is founded solely on diversity:

> the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20 or 24 of the Federal Rules of Civil Procedure, or over claims of persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

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7. Before Section 1367(b) was enacted, ancillary jurisdiction permitted parties whose presence would defeat diversity jurisdiction to intervene as of right under Fed. R. Civ. P. 24(a). *See, e.g., Smith Petroleum Serv., Inc. v. Monsanto Chem. Co.*, 420 F.2d 1103, 1113-15 (5th Cir. 1970) *cited in Kroger*, 437 U.S. at 376 n.18. Section 1367(b) eliminated this aspect of ancillary jurisdiction. This narrowing of existing law further supports the conclusion that Section 1367(a) was not meant, at the same time, to expand the number of parties eligible to join a diversity action.

28 U.S.C. § 1367(b). Section 1367(b) creates two types of restrictions on the use of supplemental jurisdiction in a diversity case. First, Section 1367(b) eliminates supplemental jurisdiction over claims by plaintiffs against parties added after the action has commenced, if the requirements of Section 1332 would have prevented plaintiffs from suing those parties at the action's outset. Second, Section 1367(b) prevents persons seeking to join or intervene as plaintiffs in a previously-filed diversity action from doing so if, under diversity requirements, they could not have joined the action at its inception. These restrictions essentially codify pre-Section 1367 case law,[8] and their purpose is to prevent plaintiffs from using supplemental jurisdiction after the action has commenced to circumvent the requirements of diversity jurisdiction — the same purpose that animated this Court's decision in *Kroger. See Kroger*, 437 U.S. at 374-75.

Section 1367(b) implements this purpose through several prohibitions on the exercise of supplemental jurisdiction. Section 1367(b) prevents plaintiffs suing in diversity from using supplemental jurisdiction to assert a claim against a defendant impleaded under Rule 14 if that claim could not have been asserted at the outset, such as when the impleaded defendant's citizenship is not diverse. *See* 28 U.S.C. § 1367(b). This prohibition furthers Section 1367(b)'s purpose by preventing plaintiffs from circumventing the requirements of diversity jurisdiction by, for example, suing a single defendant of diverse citizenship, waiting for the defendant to implead a third-party that the plaintiff expected from the outset would be impleaded, and then using Section 1367(a)'s grant of supplemental jurisdiction to sue that third party. *See Kroger*, 437 U.S. at 374 (refusing to permit precisely this result prior to the passage of Section 1367).

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8. For example, Section 1367(b)'s reference to Rule 14 codifies this Court's decision in *Kroger*. *Kroger*, 437 U.S. at 374-75.

The other provisions of Section 1367(b) prohibiting the exercise of supplemental jurisdiction over claims by plaintiffs "against persons made parties" after the complaint is filed are aimed at preventing similar tactics. The reference to Rules 19 and 24 prevent the plaintiff from suing only diverse parties in the original complaint and deferring claims against non-diverse persons until they are subsequently joined under Rule 19 or intervene under Rule 24. *See* Fed. R. Civ. P. 19; Fed. R. Civ. P. 24. The reference to Rule 20 prevents plaintiffs from suing a non-diverse party that has been joined to a cross-claim or counterclaim. *See* Fed. R. Civ. P. 13(h) (referencing joinder provisions of Rule 20); Fed R. Civ. P. 20.

Similarly, the other category of Rule 1367(b) prohibitions on the exercise of supplemental jurisdiction are directed at parties seeking to join an existing lawsuit in violation of diversity requirements. Specifically, the references to Rules 19 and 24 prevent persons whose claims would destroy diversity jurisdiction if asserted at the outset from using those rules to join or intervene in an action filed by other persons whose claims do satisfy diversity requirements. *See* Fed R. Civ. P. 19; Fed R. Civ. P. 24. Taken together, the provisions of Section 1367(b) indicate that Congress sought to prevent plaintiffs from circumventing diversity jurisdiction requirements through artful post-complaint use of supplemental jurisdiction.[9]

Section 1367(a) should be read to complement, not defeat, Section 1367(b)'s clear purpose. Interpreting Section 1367(a) to uphold the matter-in-controversy rule is consistent with Section 1367(b)'s purpose, while the Fifth Circuit's interpretation brings the operation of Section 1367(a) into conflict with that purpose.

9. Indeed, as Petitioners discuss in Part IV, *infra*, the legislative history of Section 1367 confirms that this was precisely Congress's intent. *See infra* at p. 25.

B. Under The Fifth Circuit's Reading, Section 1367(a) Renders The Prohibitions In Section 1367(b) Largely Meaningless.

Section 1367(b)'s limitations on the exercise of supplemental jurisdiction in diversity cases are nonsensical if Section 1367(a)'s original jurisdiction requirement is not read to preserve the matter-in-controversy rule. Section 1367(b) does not prohibit the exercise of supplemental jurisdiction in a diversity action over claims of plaintiffs who join together under Rule 20. If Section 1367(a) were read, as the Fifth Circuit did, to confer such jurisdiction, then the statute could drastically curtail the complete diversity requirement of *Strawbridge v. Curtiss*, 3 Cranch (7 U.S.) 267 (1806), as well as the matter-in-controversy rule of *Zahn* and *Snyder*, because plaintiffs with jurisdictionally-insufficient claims could join diversity actions as long the claims of one plaintiff met Section 1332's requirements.

Not only would the Fifth Circuit's construction fundamentally alter diversity jurisdiction jurisprudence as it has existed for nearly 200 years, it would also trivialize the prohibitions in Section 1367(b). The Fifth Circuit's approach necessarily rests on the premise that Congress, in Section 1367(b), carefully crafted prohibitions on the exercise of supplemental jurisdiction for the purpose of protecting diversity jurisdiction requirements against incursions under Rules 14, 19, 20, and 24 after an action has begun, while at the same time leaving a wide opening for persons whose claims would defeat diversity jurisdiction to join the action at the outset as plaintiffs under Rule 20. The statute should not be read to produce such an outcome.

The Fifth Circuit's interpretation of Section 1367(a), moreover, creates at least one absurd result. Under that interpretation, persons whose claims do not satisfy diversity jurisdiction requirements cannot join a diversity action under Rule 19 or intervene under Rule 24, but they can join the action under Rule 20. *See* 28 U.S.C. § 1367(b). As Judge Easterbrook

asked: "What sense can this make?" *See Stromberg Metal Works, Inc. v. Press Mechanical*, 77 F.3d 928, 932 (7th Cir. 1996). The answer is that it makes none: under this interpretation, a plaintiff may voluntarily dismiss his action and refile adding a co-plaintiff under Rule 20 who could not have been added under Rule 19 or who could not have intervened under Rule 24. Congress could not have intended to tailor the scope of supplemental jurisdiction based on meaningless distinctions between the ways plaintiffs can join a lawsuit.

However, if Section 1367(a)'s original jurisdiction prerequisite is understood to preserve the matter-in-controversy rule, Section 1367(b)'s restrictions merely track existing case law and make sense. Under this reading of Section 1367(a), there is no need for Section 1367(b) to include a reference to Rule 20 or Rule 23. Section 1367(a) does not confer supplemental jurisdiction over actions where the claims of any of the plaintiffs or class members do not satisfy diversity jurisdiction requirements, obviating the need to prohibit the exercise of such supplemental jurisdiction in Section 1367(b). The prohibitions in Section 1367(b) on the exercise of supplemental jurisdiction simply prevent an artful plaintiff from later adding claims or parties that, consistent with diversity jurisdiction requirements, could not have been included at the outset. *See Kroger*, 437 U.S. at 374-75.

The reality that Section 1367(b)'s provisions make sense only if Section 1367(a) preserves the matter-in-controversy rule is strong evidence that Congress intended to leave the rule intact. *See, e.g., United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (concluding that the absurd results created by a literal reading of the statutory text strongly indicated that Congress did not intend the statute to operate as an unreflective reading of the text would suggest); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 453-54 (1989) (finding that the absurd results created by a broad interpretation of the ambiguous word "utilize" provided strong evidence that Congress did not intend the word to be read broadly); *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892) (stating that the absurd results arising from a particular statutory interpretation may make it "unreasonable to believe" that the legislature intended such an interpretation). It is always more reasonable to believe that Congress intended to enact a sensible scheme than a nonsensical one. *Cf. West Va. Univ. Hosp. v. Casey*, 499 U.S. 83, 101 (1991) (stating that the Court's role in statutory interpretation is to "make sense rather than nonsense out of the corpus juris"); *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 275 (1995) (particular statutory interpretation favored partly because it was "sensible").

Here, reading Section 1367(a) as preserving the matter-in-controversy rule makes sense of Section 1367(b)'s restrictions. In contrast, the Fifth Circuit's interpretation of Section 1367(a) deprives Section 1367 of a coherent purpose and leads to absurd results. Because Congress certainly did not intend to create a nonsensical statute, Section 1367(b)'s provisions provide compelling evidence that Congress drafted Section 1367 with the understanding that the amount-in-controversy rule, as interpreted by *Zahn* and other decisions of this Court, was left intact.

IV. THE LEGISLATIVE HISTORY CONCLUSIVELY ESTABLISHES THAT CONGRESS INTENDED SECTION 1367 TO PRESERVE THE MATTER-IN-CONTROVERSY RULE.

A. The Committee Reports And Other Legislative Materials Reliably And Conclusively Demonstrate That Congress Did Not Intend To Alter The Matter-In-Controversy Rule.

The legislative history of Section 1367 makes it unmistakably clear that Congress intended for the statute to perpetuate this Court's long-standing interpretation of "matter in controversy" as applied in multi-plaintiff actions. Section 1367 had its genesis in a report written by the Federal Courts Study Committee (the "Study Committee"), established by the

100th Congress in 1988. 28 U.S.C. § 331 (1988). The Study Committee spent fifteen months undertaking "the most comprehensive examination of the federal court system in the half-century." Federal Courts Study Comm., 101st Cong., 2d Sess., Report of the Fed. Courts Study Comm. 31 (Comm. Print 1990) ("Report"), at 3. The Study Committee found that one of the greatest problems facing the federal judiciary was the size of its docket, which the Report termed a "crisis." *Id.* at 4-10. The Study Committee determined that one of the primary reasons for the overloaded nature of the federal docket was diversity jurisdiction, which accounts for half of the federal courts' caseload. *Id.* at 14, 38-42. It noted that the burgeoning diversity caseload significantly affected the federal courts' ability to administer federal question cases in a timely fashion:

> The general (not unvarying) principle of division should be that state courts resolve disputes over state law and federal courts resolve disputes over federal law. We do not base this principle on a love of symmetry, but on a theory of comparative advantage and on a desire that federal courts remain accessible in a practical as well as a theoretical sense to federal claimants.

Id. at 14. As a result of these concerns, the Study Committee recommended that Congress substantially reduce diversity jurisdiction. *Id.* at 14-15, 39-41. In so doing, the Study Committee rejected a proposal by a subcommittee to overrule *Zahn*. *See* Report to the Federal Courts Study Comm. of the Subcomm. on the Federal Courts and Their Relation to the States (Mar. 12, 1990) (Working Papers), *reprinted in* Federal Courts Study Committee, Working Papers and Subcommittee Reports, Vol. 1 (July 1, 1990) at 561 n.33; *see also Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 219 (3d Cir. 1999) (discussing Study Committee's rejection of subcommittee proposal).

In July, 1990, H.R. 5381, entitled the "Federal Courts Study Committee Implementation Act of 1990" was introduced in the

House of Representatives. *See* H.R. 5381, 101st Cong. (Version 1, Aug. 1, 1990). Section 120 of that bill addressed supplemental jurisdiction and was significantly different from the version ultimately enacted. On September 6, 1990, the Chairman of the Study Committee, Judge Joseph Weis, testified before a subcommittee of the House Judiciary Committee considering the bill and objected to section 120 as an expansion of diversity jurisdiction that was inconsistent with the Study Committee's recommendation regarding supplemental jurisdiction. *See Federal Courts Study Comm. Implementation Act & Civil Justice Reform Act: Hearings on H.R. 5381 & H.R. 3898 Before the Subcomm. on Courts, Intellectual Property & the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 92-94 (1990) (testimony of Judge Joseph F. Weis). Judge Weis noted that section 120 would "change the doctrine of complete diversity articulated in *Strawbridge v. Curtiss*, 3 Cranch 267 and *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978)" and that the "Study Committee did not intend to encourage additional diversity jurisdiction in that fashion." *Id.* at 94. Judge Weis encouraged the Committee to distinguish between federal question cases and diversity cases and to reduce the scope of section 120 in keeping with the Study Committee's view that "the requirement of complete diversity in § 1332 cases should be continued as it presently exists and should not be eroded through operation of the proposed supplemental jurisdiction." *Id.* at 95. In late September 1990 a redrafted H.R. 5381 was introduced with an entirely different supplemental jurisdiction provision as section 114. *See* H.R. 5381, 101st Cong. (Version 2, Sept. 30, 1990; Version 3, Oct. 4, 1990). Section 114 is the provision enacted as Section 1367.

The House Judiciary Committee Report on H.R. 5381 commences by stating that "[t]he purpose of H.R. 5381 is to implement several of the more noncontroversial recommendations of the Federal Courts Study Committee." H.R. Rep. No. 101-734, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6861; *see also id.* at 16, 1990 U.S.C.C.A.N.

at 6862 ("The core of H.R. 5381 is Title I, which implements a number of salutary, but essentially noncontroversial recommendations of the Federal Courts Study Committee."). The Report describes the reforms implemented by the statute as "modest proposals that, but for the work of the Federal Courts Study Committee, might not have come to the attention of Congress at all." H.R. Rep. No. 101-734, at 15, 1990 U.S.C.C.A.N. at 6861.

The section-by-section analysis states that section 114 "implements a recommendation of the Federal Courts Study Committee." *Id.* at 27, 1990 U.S.C.C.A.N. at 6873. The report describes the advantages of pendent and ancillary jurisdiction in promoting the efficient administration of justice, but notes that "[r]ecently, however, in *Finley v. United States*, 109 S. Ct. 2003 (1989) [490 U.S. 545 (1989)], the Supreme Court cast substantial doubt on the authority of the federal courts to hear some claims within supplemental jurisdiction." *Id.* at 28, 1990 U.S.C.C.A.N. at 6874. The Report further notes that the rationale of *Finley* "threatens to eliminate other previously accepted forms of supplemental jurisdiction" and cites as an example a recently decided district court diversity case dismissing, due to *Finley*, a defendant's impleader claim against a non-diverse third party. *See id.* at 28 & n.14, 1990 U.S.C.C.A.N. at 6874 (citing *Aetna Cas. & Sur. Co. v. Spartan Mechanical Corp.*, 738 F. Supp. 664 (E.D.N.Y. 1990)). The Report concludes that legislation is necessary "to provide the federal courts with statutory authority to hear supplemental claims," *id.* at 28, 1990 U.S.C.C.A.N. at 6874, and describes Section 1367 as follows:

> This section would authorize jurisdiction in a case like *Finley*, as well as essentially restore the pre-*Finley* understandings of the authorization for and limits on other forms of supplemental jurisdiction. In federal question cases, it broadly authorizes the district courts to exercise supplemental jurisdiction over additional claims, including claims involving the joinder of additional parties. *In diversity cases, the district courts may exercise supplemental jurisdiction, except when doing so would be inconsistent with the jurisdictional requirements of the diversity statute.* In both cases, the district courts, as under current law, would have discretion to decline supplemental jurisdiction in appropriate circumstances.
>
> Subsection 114(a) generally authorizes the district court to exercise jurisdiction over a supplemental claim whenever it forms part of the same constitutional case or controversy as the claim or claims that provide the basis of the district court's original jurisdiction. [n.15] In providing for supplemental jurisdiction over claims involving the addition of parties, subsection (a) explicitly fills the statutory gap noted in *Finley v. United States*.
>
> Subsection 114(b) prohibits a district court in a case over which it has jurisdiction founded solely on the general diversity provision, 28 U.S.C. § 1332, from exercising supplemental jurisdiction in specified circumstances. [n.16] In diversity-only actions the district courts may not hear plaintiffs' supplemental claims when exercising supplemental jurisdiction would encourage plaintiffs to evade the jurisdictional requirement of 28 U.S.C. § 1332 by the simple expedient of naming *initially* only those defendants whose joinder satisfies section 1332's requirements and *later* adding claims not within original federal jurisdiction against other defendants who have intervened or been joined on a supplemental basis. *In accord with case law*, the subsection also prohibits the joinder or intervention of persons as plaintiffs if adding them is inconsistent with section 1332's requirements. *The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332*

in diversity-only class actions, as those requirements were interpreted prior to Finley. [n.17]

n.15 In so doing, subsection (a) codifies the scope of supplemental jurisdiction first articulated by the Supreme Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

n.16 The net effect of subsection (b) is to implement the principal rationale of *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 57 L. Ed. 2d 274, 98 S. Ct. 2396 (1978).

n.17 *See Supreme Tribe of Ben Hur v Cauble*, 255 U.S. 356, 65 L. Ed. 673, 41 S. Ct. 338 (1921); *Zahn v. International Paper Co.*, 414 U.S. 291, 38 L. Ed. 2d 511, 94 S. Ct. 505 (1973).

Id. at 28-29, 1990 U.S.C.C.A.N. at 6874-75 (emphasis added). The Report notes that Section 1367(b) does make "one small change in pre-*Finley* practice," *i.e.*, excluding Rule 24(a) intervenors to the same extent as those sought to be joined as plaintiffs under Rule 19. *Id.* at 29, 1990 U.S.C.C.A.N. at 6875.[10] The House report was adopted by the Senate Judiciary Committee in its consideration of the bill. *See* 136 Cong. Rec. S17580-81 (daily ed. Oct. 27, 1990). Section 114 was enacted as section 310 of the Judicial Improvements Act of 1990. *See* Pub. L. No. 101-650, 104 Stat. 5089.

There is no legislative history suggesting Congress was undertaking a major change in the rules of original or supplemental jurisdiction, nor were any comments made reflecting a belief that the revised version of the supplemental jurisdiction provision would overrule *Zahn* or other cases

10. The Report contains a typographical error in which Rule 24(a) is written as "Rule 23(a)." In the context of a discussion of intervention and given the actual language of Section 1367(b) prohibiting Rule 19 joinder and Rule 24 intervention in the same phrase, the reference in the Report to Rule 23(a) must have been a typographical error.

governing the basic rules of original jurisdiction. Indeed, there is no other legislative history at all.

Thus, the legislative history is clear that Congress: (1) intended Section 1367 to leave the matter-in-controversy rule intact, (2) intended to retain the other original jurisdiction requirements of Section 1332 (such as the complete diversity requirement), (3) intended to distinguish, as case law had in the past, between federal question and diversity cases insofar as the addition of supplemental parties and claims was concerned, (4) intended Section 1367(b) to prevent certain joinder and intervention maneuvers made subsequent to the filing of the complaint, and (5) intended to codify pre-*Finley* law except insofar as Rule 24(a) intervention was concerned.[11]

This legislative history should be regarded as compelling evidence of congressional intent, for three reasons. First, it is entirely one-sided. There is no need for this Court to decide which legislator's statements it will credit, or to compare varying analyses of the bill created by differing committees. Second, the only legislative history that must be consulted are committee reports, which are an authoritative source of congressional intent when reference to legislative history is appropriate. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represents the considered and

11. Both the Tenth and Third Circuits noted Congress's clear intent not to overrule *Zahn* and to fashion subsection (b) so as to prevent certain post-complaint maneuvers that would be inconsistent with the original jurisdiction requirements of Section 1332. *See Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640-41 (10th Cir. 1998); *Meritcare*, 166 F.3d at 222. The Fifth Circuit appeared to agree that Congress intended to leave *Zahn* intact. Pet. App. 87a. Apparently the only cases to the contrary are ones that mistakenly failed to understand that the Study Committee had rejected the subcommittee's proposal to overrule *Zahn*. *See Meritcare*, 166 F.3d at 219 n.4 (citing district court cases).

collective understanding of those Congressmen involved in drafting and studying the proposed legislation.' ") (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)). Third, both the House of Representatives and the Senate "agreed on the pertinent language" in the committee reports. *Leonhardt*, 160 F.3d at 641, fn. 9. All three of these characteristics lessen the danger that the legislative history may reflect the will of one or only a handful of legislators, and make it highly probable that the legislative history accurately reflects the intent of Congress in passing Section 1367.

B. The Absence of Any Reference In The Legislative History Of Section 1367 To Overruling The Matter-In-Controversy Rule Is Further Evidence That Congress Did Not Intend To Do So.

The legislative history of Section 1367 makes Congress's intention clear, not only by what it says, but also by what it omits. The legislative history is absolutely devoid of any statement indicating that Congress even considered abrogating the matter-in-controversy rule. The rule is so well-established in this Court's jurisprudence that if Congress had intended for Section 1367 to change the rule "some express statement of that intention would surely have appeared" either in the statute itself or in its legislative history. *Zahn*, 414 U.S. at 302. But, as in *Zahn*, "we find not a trace to this effect." *Id.*

The complete absence of any congressional history remotely suggesting that Congress meant to alter the matter-in-controversy rule is strong evidence that Congress did not intend such a sweeping change in jurisdictional law. *See American Hosp. Ass'n v. N.L.R.B.*, 499 U.S. 606, 613-14 (1991) ("If this amendment had been intended to place the important limitation on the scope of the Board's rulemaking powers that petitioner suggests, we would expect to find some expression of that intent in the legislative history."). Congress generally does not effect sweeping changes in the law without any comment from objectors:

> In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.

Harrison v. PPG Indus., Inc., 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting), *cited in American Hosp. Ass'n*, 499 U.S. at 614; *see also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 267 (1979) ("At the very least, one would expect some hint of a purpose to work such a change, but there was none."). Here, congressional silence is deafening: had Congress intended to overrule case law as fundamental as *Strawbridge* and *Zahn*, surely such a purpose would have drawn some comment in the legislative process.

V. CONGRESSIONAL INTENT TO MAINTAIN THE-MATTER-IN-CONTROVERSY RULE IS CONTROLLING.

Given the language and structure of Section 1367, as well as its legislative history, it is indisputable that to read Section 1367 to overturn the matter-in-controversy rule would flout congressional intent. The purpose of statutory construction is to determine Congress's intent. *Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998) ("If, by employing traditional tools of statutory construction, we determine that Congress's intent is clear, that is the end of the matter.") (quotation and citations omitted); *Chevron v. Natural Resources Def. Council*, 467 U.S. 837, 842 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

Usually the language of the statute provides the most reliable evidence of Congress's intent and for that reason statutory construction begins with the words of the statute. *Holloway v. United States*, 526 U.S. 1, 119 S. Ct. 966, 969

(1999). As a result, in general, where the language of the statute conveys a plain meaning, that meaning controls and statutory construction is complete. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

However, where there is no plain meaning, as a result of ambiguity or a statutory scheme that is not "coherent and consistent," the statutory language is not dispositive. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (quotation omitted). In such cases, the Court may look to legislative history and other evidence of congressional intent. *See Concrete Pipe & Prods. of Cal,. Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 627 (1993) (stating that statutory incoherence or ambiguity justifies reference to legislative history); *see also Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 608-609, 610 n.4 (holding that judicial inquiry benefits by reference to legislative history and was proper in case where statutory scheme was "unclear" and suffered from "textual inadequacies"); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985). To determine plainness or ambiguity, the Court refers to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341; *see also Brown v. Gardner*, 513 U.S. 115, 118 (1994) (employing "textual cross-reference" to other portions of same statutory scheme to determine meaning) (quotation omitted). A phrase that is unambiguous is one that "has a clearly accepted meaning in both legislative and judicial practice." *West Va. Univ. Hosps*, 499 U.S. at 98.

Further, the language of a statute is not dispositive where, applied literally, it would produce significant "anomalies," *X-Citement Video*, 513 U.S. at 68, or results that are "absurd," *id.* at 69, or "odd," *id.*; *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509-10 (1989). In *X-Citement Video*, a literal reading of the statute would have criminalized UPS drivers and other innocents who knowingly transported materials despite having no knowledge that the materials were pornographic. The

Court thus looked to legislative history and held that the plain meaning did not control. 513 U.S. at 73-79. In *Green*, a literal reading of the language of Federal Rule of Evidence 609 would have denied a civil plaintiff the right to impeach the testimony of his adversary while granting that right to a civil defendant. *Green*, 490 U.S. at 509. The Court concluded that "[n]o matter how plain the text of the Rule may be" such an interpretation could not be accepted given that it would "compel an odd result." *Id.* at 509-510; *see also id.* at 527 (Scalia, J., concurring in the judgment) ("I think it entirely appropriate to consult all public materials, including the background of Rule 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of, and thus to justify a departure from the ordinary meaning. . . .").

Here, even if the Fifth Circuit's interpretation of Section 1367(a) is given some credence, the most that would be established is that the statute is susceptible of different meanings, i.e., that it is ambiguous. Such an ambiguity would, in turn, militate reference to legislative history, as the vast majority of lower courts have done. *See, e.g., Meritcare*, 166 F.3d at 221.

Moreover, even if the Fifth Circuit's reading of the statute were the only possible meaning of Section 1367's language, which surely it is not, it would simply produce odd and absurd results. Here, as described in Part III.B, *supra*, the Fifth Circuit's reading of the statute produces serious anomalies and results that can only be characterized as odd and absurd, most notably by allowing plaintiffs with jurisdictionally-deficient claims to join together in filing a complaint as long as the claims of one plaintiff are jurisdictionally sufficient while prohibiting post-filing joinder and intervention tactics that would accomplish the same result. *See supra, pp.* 23 -24. This bizarre result would justify reference to the legislative history, *X-Citement Video*, 513 U.S. at 73-79, which clearly demonstrates Congress's intent

to maintain the rules of original jurisdiction in diversity cases, including *Zahn*.[12]

Finally, even ignoring such absurd and odd results, it is fundamental that where the text of a statute, literally applied, would "produce a result demonstrably at odds with the intentions of its drafters" then "the intention of the drafters, rather than the strict language, controls." *Ron Pair,* 489 U.S. at 242; *Ardestani v. INS*, 502 U.S. 129, 135-36 (1991) (same); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987) (same); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (same); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (same). Clearly, the Fifth Circuit's reading of Section 1367 is at odds with the intentions of the drafters of Section 1367. The House Committee responsible for drafting the bill specifically and clearly stated that *Zahn* would be preserved and the responsible Senate Committee adopted that statement. No reasonable observer possibly could conclude that Congress intended Section 1367 to overrule *Zahn*. Ignoring the clear congressional intent, particularly when the language of a statute easily can be read as consistent with that intent, would disrespect Congress's role in our system of government. As Judge Pollak observed:

> To retain this case in this court is to say to Congress: "We know what you meant to say, but you didn't quite say it. So the message from us in the judicial branch to you in the legislative branch is 'Gotcha! And better luck next time.' " Such a message is not required by the separation of powers. Nor is it in

12. The *Abbott* court wrongly applied the absurdity rule by narrowly looking only at whether reversing the result in *Zahn* would be absurd. Pet. App. 88-89a. The proper inquiry examines whether the reading of the statute produces *any* absurd results as applied to factual scenarios beyond that *sub judice*. *See X-Citement Video*, 513 U.S. at 468-69 (absurdity resulted not from literal reading applied to the facts *sub judice* but literal reading applied to other, foreseeable, situations).

> harmony with the fact that Congress and the courts, however different their respective roles, are parts of a single government.

Russ v. State Farm Mut. Auto Ins. Co., 961 F. Supp. 808, 820 (E.D. Pa. 1997). Congress did not intend Section 1367 to affect the matter-in-controversy rule as stated in *Zahn*, and the Fifth Circuit's decision ignoring this intent should be reversed.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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IN THE
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ROBIN FREE AND RENEE FREE,

Petitioners,

v.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB COMPANY, AND MEAD JOHNSON & COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, authorizes federal courts to exercise supplemental jurisdiction over the claims of absent class members where, as here, those courts have original jurisdiction over the claims of the named plaintiffs.

RULE 29.6 STATEMENT

Respondents Abbott Laboratories and Bristol-Myers Squibb Company have no corporate parents, and no publicly traded company owns 10% or more of their stock. Respondent Mead Johnson & Company is a wholly-owned subsidiary of Bristol-Myers Squibb Company.

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IN THE

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v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

INTRODUCTION

This case presents a straightforward issue of statutory interpretation. The plain language of the supplemental jurisdiction statute authorizes federal courts to exercise supplemental jurisdiction over non-federal claims to the full extent allowed by Article III, except for particular categories of claims specified in the statute. Conspicuously absent from the list of statutory exceptions are claims brought on behalf of a class under Rule 23 of the Federal Rules of Civil Procedure. That is the beginning and the end of this case. The statute unambiguously authorizes courts to exercise supplemental jurisdiction over the claims of absent class members where, as here, the court has original jurisdiction over the claims of the named plaintiffs.

Petitioners, however, contend that the statute's legislative history reveals a contrary congressional "intent" that is controlling here. For them, "the central question presented by this case is whether the language of Section 1367 requires this Court to disregard Congress's unmistakable intent." Pet. Br. 6. But that approach gets matters precisely backwards. Statutory interpretation begins with the language of the statute, and, at least where that language is unambiguous, ends there. Because the relevant statutory text here is clear, it is neither necessary nor appropriate to consult the legislative history. Indeed, petitioners' contrary approach "give[s] point to the quip that only when legislative history is doubtful do you go to the statute." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 543 (1947).

In any event, petitioners' legislative history argument fails on its own terms. The passage of legislative history on which they rely does not purport to explain or interpret any particular statutory provision, but simply declares a free-floating intent bereft of any textual anchor. That is not an interpretive aid, but an alternative (and illegitimate) source of law. As this Court has emphasized, "courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point." *Shannon v. United States*, 512 U.S. 573, 584 (1994) (internal quotation and brackets omitted).

In the final analysis, there is great irony in petitioners' position that the supplemental jurisdiction statute essentially does nothing more than codify the common law of "ancillary" and "pendent" jurisdiction. For years, this Court struggled to reconcile that common law with the bedrock principle that the jurisdiction of the federal courts is governed by statute. Congress enacted the supplemental jurisdiction statute in 1990 to replace the thicket of confusing and contradictory common-law rules. Any common law rules inconsistent with the statute, accordingly, are no longer valid. If Congress did not "intend" to authorize supplemental jurisdiction over the claims at issue here, then Congress can always amend the statute. But that, of course, is a matter for Congress, not this Court.

STATEMENT OF THE CASE

Petitioners Robin and Renee Free filed this class action in Louisiana state court in October 1993, alleging that respondents Abbott Laboratories, Bristol-Myers Squibb Company, and Mead Johnson & Company conspired to raise the price of infant formula in Louisiana in violation of state law. J.A. 39a-51a. Petitioners purported to represent a class consisting of "[a]ll consumers who reside in the State of Louisiana and who, at any time during the period of January 1, 1980 through December 31, 1992, purchased one or more of the [respondents'] brands of infant formula in the State of Louisiana." J.A. 41a. They sought treble damages, attorney's fees, costs, and interest, but purported to disclaim any damages in excess of $20,000 per class member. J.A. 40a-41a.

Respondents timely removed the action to federal court, and petitioners moved to remand. *See* Pet. App. 100a. The district court (Parker, C.J., M.D. La.) held that the case was within the scope of federal jurisdiction, but declined to exercise that jurisdiction on discretionary grounds. Pet. App. 92a-97a, 103a-05a.

The district court first concluded that it could exercise diversity jurisdiction over the named plaintiffs' claims under 28 U.S.C. § 1332 because (1) there was complete diversity of citizenship between the named plaintiffs and the defendants, Pet. App. 99a, 103a, and (2) "the named plaintiffs have claims in excess of $50,000 because under Louisiana law the attorney's fees allowed by statute are attributed to the class representatives," Pet. App. 104a (citing La. Code Civ. Proc. Ann. art 595). The court then concluded that it could exercise supplemental jurisdiction over the absent class members' claims under 28 U.S.C. § 1367 because those claims were "so related to [the named plaintiffs' claims] that they form part of the same case or controversy under Article III of the United States Constitution." Pet. App. 104a (quoting 28 U.S.C.

§ 1367(a)). But the court ultimately abstained from exercising jurisdiction over any of the claims on the ground that they "present novel issues of state law," including the issue whether indirect purchasers have a cause of action under Louisiana antitrust law, and whether any such cause of action is preempted by federal law. Pet. App. 104a; *see also id.* at 95a-97a. Accordingly, the district court granted petitioners' remand motion.

On appeal, the Fifth Circuit vacated the remand order. Pet. App. 76a-91a. The court began by affirming the district court's conclusion that it had diversity jurisdiction over the named plaintiffs' claims. Pet. App. 79a-82a. Like the district court, the court of appeals held that the named plaintiffs' claims satisfied both the complete diversity and matter-in-controversy requirements of the diversity statute. In particular, the court of appeals agreed with the district court that the matter-in-controversy requirement was satisfied because Louisiana law awards all attorneys' fees in a class action to "'the representative parties,'" rather than to the class as a whole. Pet. App. 81a (quoting La. Code Civ. Proc. Ann. art. 595).

The Fifth Circuit next affirmed the district court's conclusion that it had supplemental jurisdiction over the absent class members' claims. Pet. App. 82a-89a. The court of appeals explained that the supplemental jurisdiction statute's "first section vests federal courts with the power to hear supplemental claims generally, subject to limited exceptions set forth in the statute's second section." Pet. App. 87a. Because "[c]lass actions are not among the enumerated exceptions," supplemental jurisdiction here was proper. *Id.* That conclusion, the Fifth Circuit recognized, had the effect of superseding the result in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), an effect specifically disclaimed by a passage in the legislative history. "But the statute is the sole repository of congressional intent where the statute is clear and does not demand an absurd result." Pet. App. 87a-88a. Because "abolishing the strictures of *Zahn* is not an absurd result," the

Fifth Circuit held, the plain language of the statute was controlling. Pet. App. 88a.

Finally, the court of appeals reversed the district court's decision to abstain from exercising its jurisdiction over this case. Pet. App. 89a-91a. There was no basis for declining jurisdiction over the named plaintiffs' claims, the Fifth Circuit held, because "[s]tanding alone . . . the novelty or complexity of state law issues is not enough to compel abstention." Pet. App. 90a. Accordingly, "[t]his is not one of those truly rare and exceptional cases in which *Colorado River* abstention is proper." *Id.* It followed, the appellate court held, that there was no basis to abstain from exercising supplemental jurisdiction over the absent class members' claims. "The court must now adjudicate claims of the class representatives—including the same novel and complex state law issues the district court preferred to leave to Louisiana." *Id.* "In short," the Fifth Circuit concluded, "the entire case should remain in federal court." Pet. App. 91a.

The case thus returned to the district court, which ultimately dismissed all claims with prejudice on the ground that petitioners, as indirect purchasers, lacked antitrust standing under Louisiana law. Pet. App. 26a-41a. Petitioners appealed that ruling to the Fifth Circuit, which certified the dispositive state-law questions to the Louisiana Supreme Court. Pet. App. 10a-25a. A divided Louisiana Supreme Court, however, denied the certification order. Pet. App. 9a. Accordingly, the Fifth Circuit proceeded "to fathom Louisiana's unsettled antitrust law as Louisiana courts would do it," Pet. App. 2a, and affirmed the district court's conclusion that Louisiana would follow federal law in holding that indirect purchasers like petitioners lack antitrust standing, *see id.* (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1978)).

Petitioners then sought this Court's review, limited to the sole question whether the supplemental jurisdiction statute authorizes federal courts to exercise jurisdiction over the claims of absent class members "as long as diversity

jurisdiction exists over the claims of one named plaintiff." Pet. i. This Court granted *certiorari* on November 29, 1999.

SUMMARY OF ARGUMENT

This case is governed by two provisions of the supplemental jurisdiction statute, 28 U.S.C. § 1367. The first, subsection (a), broadly authorizes federal courts to exercise supplemental jurisdiction over nonfederal claims that form part of the same Article III case or controversy as claims within the courts' original jurisdiction. The second, subsection (b), carves out certain specific exceptions to supplemental jurisdiction where the courts' original jurisdiction is based on diversity of citizenship. The claims of the absent class members here fall within the scope of subsection (a), and are not carved out by subsection (b).

The absent class members' claims fall within the scope of subsection (a) because they form part of the same Article III case or controversy as the named plaintiffs' claims, which are within the federal courts' original jurisdiction. (Petitioners do not dispute that the named plaintiffs satisfy both the complete diversity and matter-in-controversy requirements of the diversity statute.) The absent class members' claims are not carved out by subsection (b) because that subsection does not include claims brought under Rule 23 of the Federal Rules of Civil Procedure. Accordingly, as the Fifth Circuit concluded, the absent class members' claims are properly within the federal courts' supplemental jurisdiction.

Petitioners' two arguments against this straightforward application of the supplemental jurisdiction statute are manifestly incorrect. *First*, petitioners argue that the statute requires original jurisdiction over *all* claims in a particular "civil action" as a predicate for exercising supplemental jurisdiction. That argument, however, makes no sense, because the whole point of supplemental jurisdiction is to allow courts to exercise jurisdiction over claims that are *not* otherwise within their original jurisdiction. Indeed, this Court rejected

precisely this argument just two Terms ago in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997).

Second, petitioners argue that the failure of any plaintiff to satisfy the matter-in-controversy requirement destroys "original jurisdiction" over the entire action. That is not true. Under long-settled law, the failure of one of multiple plaintiffs to satisfy the statutory matter-in-controversy requirement requires dismissal of *that* plaintiff, but does not require dismissal of *other* plaintiffs who satisfy that requirement. *See, e.g., Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588-90 (1939); *Grosjean v. American Press Co.*, 297 U.S. 233, 241-42 (1936); *Rich v. Lambert*, 53 U.S. (12 How.) 347, 352-53 (1851).

A textual interpretation of the supplemental jurisdiction statute, to be sure, has the result of superseding the implicit holding in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that courts cannot exercise common-law ancillary jurisdiction over absent class members' claims even when they have original jurisdiction over the named plaintiffs' claims. But that result is by no means absurd; to the contrary, it is eminently sensible. *Zahn* drew a strong dissent, and has since been widely criticized, in part because it encouraged wasteful duplicative litigation: those members of a class who could satisfy the amount-in-controversy requirement could proceed in federal court, but those members of that very same class who could not were forced to litigate the identical issues in state court.

Because the text of the statute is plain and does not lead to an absurd result, there is no basis for consulting the legislative history. Petitioners rely on an isolated passage from a committee report that they interpret as expressing congressional "intent" to retain the implicit holding in *Zahn*. But that passage does not have the force of law, and thus cannot override the statute's plain text. Legislative history cannot be used to *create*, but only to *resolve*, doubts about the meaning of a statute.

Petitioners' legislative history argument, moreover, fails on its own terms. The snippet of legislative history on which they rely does not purport to explain or interpret any particular provision of the statute, but simply expresses a free-floating intention divorced from the statutory text. As this Court explained in *Shannon v. United States*, 512 U.S. 573, 583 (1994), such legislative history serves no legitimate purpose.

In any event, the legislative history as a whole in this case confirms the textual conclusion that the supplemental jurisdiction statute supersedes the implicit holding in *Zahn*. The language and structure of the statute as ultimately enacted are in all material respects identical to a draft statute that was expressly intended to supersede *Zahn*. Petitioners' argument that the legislative history here is "entirely one-sided," Pet. Br. 31, is thus inaccurate, and the legislative history actually supports respondents at least as much as petitioners.

ARGUMENT

I. THE PLAIN TEXT OF SECTION 1367 AUTHORIZES COURTS TO EXERCISE SUPPLEMENTAL JURISDICTION OVER THE CLAIMS OF ABSENT CLASS MEMBERS.

As this Court has emphasized time and again, an analysis of any statute must begin with the statutory text itself, not with external sources. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Caminetti v. United States*, 242 U.S. 470, 485 (1917). In this case, the Court need proceed no further than this indispensable initial step in the analysis.

The first subsection of the supplemental jurisdiction statute, 28 U.S.C. § 1367(a), broadly authorizes federal courts to exercise supplemental jurisdiction to the limits of Article III. The second subsection of that statute, § 1376(b), then carves out specific exceptions to that authority in diversity cases. Because the claims of the absent class members in this case fall within the first subsection, but are not carved out by the second subsection, the Fifth Circuit properly concluded that those

claims fell within the statutory scope of supplemental jurisdiction.[1]

A. The Plain Text of Subsection 1367(a) Encompasses the Claims of Absent Class Members Where the Claims of the Named Plaintiffs Are Within the Federal Courts' Original Jurisdiction.

This case is governed by subsection (a) of the supplemental jurisdiction statute, which provides in its entirety:

> (a) Except as provided in subsection (b) or (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

This provision extends federal jurisdiction over claims otherwise outside that jurisdiction when two conditions are met (1) the district court in "any civil action" must have "original jurisdiction" over some claim or claims, and (2) the claim or claims for which supplemental jurisdiction is sought must form part of the same "case or controversy under Article III of the United States Constitution" as the claim or claims within the district court's original jurisdiction. Both of these conditions are met here.

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[1] The third subsection of the statute, § 1367(c), authorizes courts to decline to exercise their supplemental jurisdiction under exceptional circumstances. The Fifth Circuit, however, held that the district court abused its discretion by declining jurisdiction over the absent class members' claims under that provision, *see* Pet. App. 89a-91a, and petitioners have not challenged that holding in this Court.

First, the district court had "original jurisdiction" over the named plaintiffs' claims under the diversity statute, 28 U.S.C. § 1332.[2] As the courts below recognized, the named plaintiffs here are citizens of different States than the defendants, and their claims satisfy the statutory matter-in-controversy requirement because they alone are entitled to collect all attorneys' fees under Louisiana law. Pet. App. 79a-82a (Fifth Circuit); 103a-04a (district court). Petitioners do not contest either of these points.[3]

Second, the absent class members' claims are part of the same constitutional "case or controversy" as the named plaintiffs' claims. All of these claims "derive from a common nucleus of operative fact." *Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). Indeed, the named plaintiffs and the absent class members challenge precisely the same conduct, which is why petitioners purport to represent the absent class members in the first place. *See, e.g.*, J.A. 44a ("[T]he claims of the representative parties are typical of the claims applicable to the entire class."); *id.* ("[Q]uestions of law and fact common to the

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[2] The "original jurisdiction" inquiry is the same in cases removed from state court as in cases filed in federal court in the first instance. As this Court recently explained, "a removed case is necessarily one 'of which the district courts have original jurisdiction.'" *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 165 (1997) (citing 28 U.S.C. § 1441(a)); *see also id.* at 176 n.1 (Ginsburg, J., dissenting).

[3] Petitioners' *amicus*, the State of Louisiana, asserts that the fee-shifting statute on which the lower courts relied is *procedural*, not *substantive*, in nature, and hence inapplicable in federal court under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). *See* La. Br. 4, 8-9. That is incorrect. To the contrary, it is well-settled that such fee-shifting statutes are substantive, not procedural, in nature, and hence apply in federal court. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975). That is true regardless of whether the State characterizes the statute as substantive or procedural for its own purposes. *See, e.g., Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945). Petitioners, it is worth noting, do not challenge this point; to the contrary, it is the very premise of the Question Presented in their petition for *certiorari* that "diversity jurisdiction exists over the claims of one named plaintiff." Pet. i.

class predominate over any questions affecting only individual members of the class."). Whatever the outer limits of a single "case or controversy" under Article III, it is clear that all of the claims in this case fall well within them. *See, e.g., City of Chicago v. International College of Surgeons*, 522 U.S. 156, 165-66 (1997); *Gibbs*, 383 U.S. at 725. Again, petitioners do not contest this point.

Petitioners, however, insist that the statutory predicate for supplemental jurisdiction is lacking here because this case is not a "civil action of which the district courts have original jurisdiction." Pet. Br. 9-19. That argument is based on two erroneous assumptions.

First, petitioners assume that the statute requires "original jurisdiction" over an *entire* "civil action" before supplemental jurisdiction can be exercised. That assumption, however, collapses the original and supplemental jurisdiction inquiries, and makes no sense. "The whole point of supplemental jurisdiction is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking." *International College of Surgeons*, 522 U.S. at 167. If the supplemental jurisdiction statute required original jurisdiction over *all* claims in a particular "civil action," then supplemental jurisdiction would be entirely superfluous. By definition, supplemental jurisdiction applies *only* to claims outside the federal courts' original jurisdiction. Petitioners' assumption would thus render the entire supplemental jurisdiction statute a nullity.

The statutory requirement of "original jurisdiction," in other words, applies to *some*, but not *all*, claims in a particular "civil action." The statute underscores this point by authorizing supplemental jurisdiction "over all *other* claims" that form part of the same constitutional case or controversy as "claims in the action within such original jurisdiction." 28 U.S.C. § 1367(a) (emphasis added). If the statute required original jurisdiction over *all* claims in the "civil action," then by definition there

would be no "other claims" over which to exercise supplemental jurisdiction.

This Court confirmed this common-sense point just two Terms ago in *International College of Surgeons*. The party opposing supplemental jurisdiction there, like petitioners here, argued against supplemental jurisdiction on the ground that its nonfederal claims were not within the "original jurisdiction" of the federal courts. *See* 522 U.S. at 166. This Court squarely rejected that argument. *See id.* at 166-69. The initial inquiry, the Court explained, was whether *any* of the claims in the "civil action" were within the district court's "original jurisdiction." *Id.* at 166. If so, "the relevant inquiry respecting the accompanying state claims is whether they fall within a district court's supplemental jurisdiction, not its original jurisdiction." *Id.* at 167. The contrary approach, which would require *all* claims to fall within the "original jurisdiction" of the federal courts, "would effectively read the supplemental jurisdiction statute out of the books." *Id.*

Second, petitioners erroneously assume that a court cannot exercise "original jurisdiction" over the claims of *any* plaintiff in a "civil action" based on diversity where the statutory matter-in-controversy requirement is not met with respect to the claims of *every* plaintiff. That assumption, which petitioners dub the "matter-in-controversy rule," Pet. Br. 7, is flatly inconsistent with settled law.

Petitioners' error stems from their misreading of the long line of cases holding that "the claims of *each* plaintiff must satisfy the jurisdictional minimum." Pet. Br. 13 (emphasis added). What that long line of cases establishes is that multiple plaintiffs cannot satisfy the matter-in-controversy requirement by simply aggregating their claims. *See, e.g., Zahn v. International Paper Co.*, 414 U.S. 291, 295 (1973); *Snyder v. Harris*, 394 U.S. 332, 336 (1969); *Rogers v. Hennepin County*, 239 U.S. 621, 622 (1916); *Wheless v. City of St. Louis*, 180 U.S. 379, 382 (1901); *Oliver v. Alexander*, 31 U.S. (6 Pet.) 143, 147-48 (1832). Contrary to petitioners' assumption, that

line of cases does not establish that the presence of "*any* plaintiff with claims for less than the jurisdictional minimum" necessarily defeats diversity jurisdiction with respect to every *other* plaintiff in the same civil action. Pet. Br. 16 (emphasis added).

Indeed, just the opposite is true. It has been settled for well over a century that federal courts *can* exercise original jurisdiction over the claims of those plaintiffs who satisfy the statutory matter-in-controversy requirement, even if the claims of one or more *other* plaintiffs in the same action fail to satisfy that requirement. Thus, in *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588-90 (1939), this Court dismissed the claims of those plaintiffs who failed to satisfy the matter-in-controversy requirement, but *not* the claims of the single plaintiff who satisfied that requirement. As the *Clark* Court explained, "[p]roper practice requires that where each of several plaintiffs is bound to establish the jurisdictional amount with respect to his own claim, the suit should be dismissed *as to those who fail to show that the requisite amount is involved.*" *Id.* at 590 (emphasis added); *see also Grosjean v. American Press Co.*, 297 U.S. 233, 241-42 (1936) (holding that district court properly exercised jurisdiction over claims that satisfied the jurisdictional amount, even though other claims did not); *Rich v. Lambert*, 53 U.S. (12 How.) 347, 352-53 (1851) (exercising jurisdiction over claims that satisfied the jurisdictional amount, but dismissing claims that did not).

This point, in fact, is underscored by *Zahn*, a case that petitioners otherwise embrace. The *Zahn* Court held that a district court could not exercise diversity jurisdiction over absent class members whose claims did not satisfy the statutory matter-in-controversy requirement. 414 U.S. at 301. But the Court did not hold that this deficiency defeated diversity jurisdiction over the *entire* civil action. To the contrary, the *Zahn* Court explained that the matter-in-controversy requirement "requires dismissal of those litigants whose claims do *not* satisfy the jurisdictional amount," not those litigants

who *do* satisfy that amount. *Id.* at 295 (citing, *inter alia*, *Clark*; emphasis added). Indeed, *Zahn* expressly reaffirmed *Clark*'s holding that the matter-in-controversy requirement "requires that *any plaintiff without the jurisdictional amount* must be dismissed from the case, even though others allege jurisdictionally sufficient claims." *Id.* at 300; *see also id.* at 295-96 (noting with approval that the *Clark* Court, "[u]pon ascertaining on its own motion that only one of the plaintiffs in the District Court had presented a claim satisfying the jurisdictional amount, . . . reached the merits of *that* claim but directed the District Court to dismiss the claims of all *other* plaintiffs for want of jurisdiction") (emphasis added); *id.* at 300 (noting with approval that in *Clark* "only one of several plaintiffs had a sufficiently, large claim and all *other* plaintiffs were dismissed from the suit"); *id.* at 300 n.9 ("*Clark* requires the dismissal of any named plaintiff in an action whose case does not satisfy the jurisdictional amount."); *id.* at 301 ("Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and *any plaintiff who does not* must be dismissed from the case.") (emphasis added).

It is not true, in short, that "an exercise of supplemental jurisdiction over the absent class members in this case necessarily would defeat the original jurisdiction requirement that each and every plaintiff in the action has claims exceeding the jurisdictional minimum." Pet. Br. 16. That erroneous assumption apparently stems from petitioners' failure to distinguish between the two distinct requirements of the diversity statute: (1) complete diversity of citizenship, and (2) a matter in controversy in excess of the jurisdictional minimum. *See* 28 U.S.C. § 1332. With respect to the complete diversity requirement, it is true that the presence of a single plaintiff who is a citizen of the same State as a single defendant defeats jurisdiction over the *entire* action, at least where the relevant parties are indispensable. *See, e.g., Peninsular Iron Co. v. Stone*, 121 U.S. 631, 633 (1887); *Corporation of New Orleans v. Winter*, 14 U.S. (1 Wheat.) 91, 94-95 (1816); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (Marshall, C.J.).[4] As noted above, however, that has never been true with respect to the matter-in-controversy requirement.

Petitioners thus err by arguing that the statutory predicate for supplemental jurisdiction is lacking here because this case is not a "civil action of which the district courts have original jurisdiction." This case, like *International College of Surgeons*, is a "civil action" in which the district court has "original jurisdiction" over some, but not all, claims. And here, as in *International College of Surgeons*, the exercise of supplemental jurisdiction over the claims outside the court's original jurisdiction would not defeat the original jurisdiction requirement. Accordingly, as in *International College of Surgeons*, the statutory requirement of a "civil action of which the district courts have original jurisdiction" is clearly satisfied. And because all of the claims in this case "form part of the same case or controversy under Article III of the United States Constitution"—a point that petitioners do not even contest—it follows that the absent class members' claims fall within the broad scope of supplemental jurisdiction under subsection (a) of the statute.

B. The Plain Text of Subsection 1367(b) Does Not Carve Out the Claims of Absent Class Members.

The only remaining textual question is whether the absent class members' claims are carved out of the broad scope of supplemental jurisdiction by subsection (b) of the statute. That subsection provides in its entirety:

> (b) In any civil actions of which the district court have original jurisdiction founded solely on section 1332 of this title, the district courts

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[4] Where the relevant parties are *not* indispensable, in contrast, the court can cure a lack of complete diversity by simply dismissing a non-diverse party and retaining original jurisdiction over the rest of the action. *See, e.g., Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832-38 (1989); *Salem Trust Co. v. Manufacturers' Fin. Co.*, 264 U.S. 182, 189-90 (1924).

> shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction would be inconsistent with the jurisdictional requirements of section 1332.

This subsection must be considered here because (in contrast to *International College of Surgeons*), the "original jurisdiction" of the district court in this case is "founded solely on section 1332 of this title," the diversity statute. Subsection (b) precludes the exercise of supplemental jurisdiction over two categories of claims: (1) claims by plaintiffs against persons made parties under Federal Rules of Civil Procedure 14 (third-party practice); 19 (mandatory joinder); 20 (permissive joinder); and 24 (intervention); and (2) claims by persons proposed to be joined as plaintiffs under Rule 19 or seeking to intervene as plaintiffs under Rule 24. These exceptions sharply limit the scope of supplemental jurisdiction in diversity cases, and prevent plaintiffs from evading the requirements of diversity jurisdiction under Section 1332.

As the Fifth Circuit recognized, however, this subsection does not prevent the exercise of supplemental jurisdiction over the claims of absent class members under Rule 23 of the Federal Rules of Civil Procedure, for the simple reason that Rule 23 is "not among the enumerated exceptions" in that provision. Pet. App. 87a. This is nothing more than a straightforward application of the traditional maxim *expressio unius est exclusio alterius*. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993); *TVA v. Hill*, 437 U.S. 153, 188 (1978). If Congress had intended to preclude supplemental jurisdiction

over the claims of absent class members, it could have done so by simply adding Rule 23 to the list of rules in subsection (b). But Congress did not do so, and that omission is dispositive here. "To supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.). Where, as here, a statute "contains no exception applicable to petitioner's situation[,] we are not at liberty to create an exception where Congress has declined to do so." *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 27 (1989); *see also Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134-35 (1989).

Petitioners neither challenge this straightforward interpretation of subsection (b), nor ask this Court to insert Rule 23 into the list of rules in that subsection. Instead, they base their "textual" argument entirely on their interpretation of the "original jurisdiction" clause of subsection (a), and simply assert that "the language, purpose, and operation of Section 1367(b) strongly suggest that Congress intended to leave the matter-in-controversy rule intact." Pet. Br. 19 (capitalization modified). That assertion, however, presupposes the existence of a "matter-in-controversy" rule that would preclude the exercise of original jurisdiction over the claims of *every* plaintiff in an action where the claims of *any* plaintiff fail to satisfy the jurisdictional minimum. As explained above, no such "rule" has ever existed, and hence Congress could not have "intended" to leave any such rule "intact." Pet. Br. 19.

Petitioners also contend that subsection (b) reveals an underlying "purpose" of limiting supplemental jurisdiction in diversity actions, and that allowing courts to exercise supplemental jurisdiction over the claims of absent class members would be "inconsistent" with that purpose. Pet. Br. 19-22. The short answer to that argument is that Congress expressed its "purpose" in the text of the statute by precluding the exercise of supplemental jurisdiction over *some*, but not *all*, nonfederal claims in diversity actions. The fact that subsection (b) does not "carve out" the claims of absent class members under Rule 23 is as much a reflection of congressional intent as

the fact that subsection (b) does "carve out" specified other claims. The purpose of a statute is reflected not only in what it includes, but also in what it omits. *See, e.g., West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991).

C. A Textual Interpretation of Section 1367 Is Not Absurd.

Petitioners finally contend that the Fifth Circuit's textual interpretation of the supplemental jurisdiction statute would lead to "absurd results" that Congress could not possibly have intended. Pet. Br. 23-25, 35-36. That is not true. A textual reading of the statute is not only rational, but necessary to achieve the statutory goal of "clarify[ing] and codify[ing] instances appropriate for the exercise of pendent or 'supplemental' jurisdiction in district courts." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 48 n.6 (1995). The canon of avoiding absurd results is not a license for courts to substitute their own policy choices for those of Congress. *See, e.g., Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) ("[T]o justify a departure from the letter of the law based upon [absurdity], the absurdity must be so gross as to shock the general moral or common sense."); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring in judgment) (canon of avoiding absurd results "remains a legitimate tool of the Judiciary . . . only as long as the Court acts with self-discipline by limiting the exception to situations where the result of applying the plain language would be, in a genuine sense, absurd, *i.e.*, where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone.").

It is true that a textual interpretation of the statute has the effect of superseding the result of this Court's decision in *Zahn*.[5] But, as the Fifth Circuit explained, "[a]bolishing the

[5] It is important to note that *Zahn*, on its face, held only that absent class members do not fall within the federal courts' original diversity jurisdiction (continued...)

strictures of *Zahn* is not an absurd result." Pet. App. 88a. *Zahn*'s implicit (and hence unexplained and unexamined) holding—that federal courts lack common-law ancillary jurisdiction over the claims of absent class members who do not satisfy the statutory matter-in-controversy requirement even where the named plaintiffs satisfy that requirement—was criticized by the three dissenters, *see* 414 U.S. at 302-12, and subsequently by commentators, *see, e.g.*, David P. Currie, *Pendent Parties*, 45 U. Chi. L. Rev. 753, 766 (1978) (characterizing *Zahn* as "the bad apple" in the law of ancillary jurisdiction); Richard D. Freer, *Toward a Principled Statutory Approach to Supplemental Jurisdiction in Diversity of Citizenship Cases*, 74 Ind. L.J. 5, 19-20 & n.79 (1998) (noting that "the overwhelming majority of academic commentary has criticized *Zahn*," and citing such commentary); Thomas D. Rowe, Jr., *1367 And All That: Recodifying Federal Supplemental Jurisdiction*, 74 Ind. L.J. 53, 63 (1998) (observing that *Zahn* "has few defenders" and should be overruled).

Indeed, overturning the result in *Zahn* is not only rational, but eminently sensible. *Zahn* created the possibility of wasteful duplicative litigation: those members of a class who

[5] (...continued)
unless they individually satisfy the matter-in-controversy requirement, even where the named plaintiffs satisfy that requirement. 414 U.S. at 301. The *Zahn* majority did not address the distinct (but related) question whether a district court, having properly exercised original jurisdiction over the named plaintiffs, could thereafter exercise common-law ancillary jurisdiction over the absent class members. The dissent in *Zahn* did address that question, and concluded that such ancillary jurisdiction was proper. *See id.* at 308-09 (Brennan, J., dissenting); *see also* Charles Alan Wright, *The Law of Federal Courts* 214 (5th ed. 1994) ("*Zahn* is a puzzling case, particularly because of its failure even to consider the argument of three dissenters that recent principles of ancillary jurisdiction, which had been held to overcome the jurisdictional-amount requirement in other contexts, should do so also in connection with joinder of parties.") (footnote omitted); Pet. Br. 14 (acknowledging that the *Zahn* majority "did not directly address th[e] ancillary jurisdiction argument").

could satisfy the amount-in-controversy requirement could proceed in federal court, but those members of that same class who could not were forced to litigate the very same issues in state court. That result is not necessary to preserve the traditional federal rule against claim aggregation: "[i]t is one thing to hold one cannot independently force a flock of petty controversies upon a federal court by combining them in a single complaint; it is quite another to remit the holders of petty claims to a duplicative state court suit when there is a substantial federal suit pending." Currie, *Pendent Parties*, 45 U. Chi. L. Rev. at 756.

Overturning *Zahn*, in fact, does not open the federal courts to a single case that could not already be filed there, but simply allows claims that are properly in federal court to be brought on behalf of a class. Although that result may entail some additional burden on the federal courts, "[i]t should be a sufficient answer that denial of ancillary jurisdiction will impose a much larger burden on the state and federal judiciary as a whole, and will substantially impair the ability of the prospective class members to assert their claims." *Zahn*, 414 U.S. at 308 (Brennan, J., dissenting); *see also* Freer, *Principled Approach*, 74 Ind. L.J. at 20 ("[O]verruling *Zahn* will better equip federal courts to resolve complex interstate disputes that may not be well handled in the courts of some states.").[6]

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[6] Petitioners and their *amicus* Louisiana distort the federalism issues in this case by asserting that a textual interpretation of Section 1367 undermines "state sovereignty" by "the inevitable encroachment that would result from an increase in the number of diversity cases in federal court." Pet. Br. 18; *see also* La. Br. 3. This case is about the scope of *supplemental* jurisdiction, not the scope of *diversity* jurisdiction. Section 1367 specifies that a federal court must have original jurisdiction over some claims in a case before it can exercise supplemental jurisdiction over other claims in that case. Because there is no question here of expanding the federal courts' *original* jurisdiction, any federalism concerns are insubstantial. In any event, Louisiana's invocation of federalism principles here is ironic, as Louisiana itself chose to file a related lawsuit against respondents in federal, rather (continued...)

Overturning *Zahn* also creates a sensible symmetry in class actions between the two requirements of the diversity statute. Since this Court's decision in *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 366 (1921), it has been settled that the requirement of complete diversity of citizenship in class actions is assessed solely by reference to the citizenship of the named plaintiffs, not the absent class members. But *Zahn* rejected that approach with respect to the statutory matter-in-controversy requirement, holding that absent class members whose claims did not meet the jurisdictional minimum must be dismissed even where the named plaintiffs' claims satisfied that requirement. *See* 414 U.S. at 301. As the *Zahn* dissent noted, "it is difficult to understand why the practical approach the Court took in *Supreme Tribe of Ben-Hur* must be abandoned where the purely statutory 'amount in controversy' requirement is concerned." 414 U.S. at 309 (Brennan, J., dissenting); *see also* Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 Va. L. Rev. 1769, 1818 (1992) (*Zahn* created a "wholly illogical dichotomy" with *Ben Hur*); Thomas C. Arthur & Richard D. Freer, *Close Enough For Government Work: What Happens When Congress Doesn't Do Its Job*, 40 Emory L.J. 1007, 1008 n.6 (1991) ("*Zahn* is inconsistent with the Court's holding in *[Ben Hur]*.").

The issue here, of course, is not whether overturning *Zahn* is a good idea or a bad one, but only whether the idea is absurd. Because it is not, this Court must take the statute at face value. As the Fifth Circuit put it, "the wisdom of the statute is not our affair beyond determining that overturning *Zahn* is not absurd." Pet. App. 89a.

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[6] (...continued)
than state, court. *See, e.g., In re Infant Formula Antitrust Litig.*, MDL No. 878 (N.D. Fla. Sept. 30, 1996).

Petitioners, however, assert that the Fifth Circuit "wrongly applied the absurdity rule by narrowly looking only at whether reversing the result in *Zahn* would be absurd." Pet. Br. 36 n.12. According to petitioners, the Fifth Circuit's textual analysis must be rejected because it would produce *other* allegedly absurd results. *See id.* In particular, petitioners contend that the Fifth Circuit's analysis would effectively abrogate the complete diversity requirement as construed in *Strawbridge*, 7 U.S. (3 Cranch) at 267, by allowing courts to exercise supplemental jurisdiction over claims where the parties lack complete diversity. Pet. Br. 23. The plain text of the statute, however, refutes that contention.

For one thing, as petitioners themselves point out, the statute's subsection (a) authorizes the exercise of supplemental jurisdiction only where the district court has "original jurisdiction" over at least some claims in a "civil action." As noted above, *see supra* at 14-15, the *Strawbridge* rule precludes the exercise of original jurisdiction over an entire action unless there is complete diversity between every indispensable party. Accordingly, any case in which the indispensable parties are not completely diverse is not within the federal courts' original diversity jurisdiction. (Where non-indispensable parties are not completely diverse, the court can simply dismiss those parties. *See supra* note 4).

In addition, the statute's subsection (b) specifically carves out of supplemental jurisdiction "claims by plaintiffs against persons made parties" under Rule 20 of the Federal Rules of Civil Procedure (which authorizes multiple defendants to be joined in a single lawsuit) where doing so "would be inconsistent with the jurisdictional requirements of section 1332." That exception, of course, protects *Strawbridge* (one of the "jurisdictional requirements of section 1332") by

preventing the exercise of supplemental jurisdiction over claims against multiple non-diverse defendants.[7]

Petitioners' further argument that the inclusion of Rule 20 in subsection (b) produces "at least one" anomaly, *see* Pet. Br. 23, is wholly beside the point. This case is about the exercise of supplemental jurisdiction over claims under Rule 23, not Rule 20. Whether the *inclusion* of Rule 20 in subsection (b) produces anomalous results is different than whether the *exclusion* of Rule 23 from that subsection produces such results. The anomaly identified by petitioners would not be solved by the addition of Rule 23 to subsection (b). "Whether § 1367(b) is a model drafting exercise may be doubted," but that does not give courts license to ignore the plain text of the statute. *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 932 (7th Cir. 1996). The bottom line is that Rule 23 is nowhere to be found among the statutory exceptions to supplemental jurisdiction, and that omission does not produce absurd results. Whether any *other* aspect of subsection (b) produces any "apparent incongruity," *id.*, and how courts should address any such incongruity, are simply not questions presented in this case.

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[7] Petitioners seek to limit the scope of this exception by asserting that Rule 20 applies only to defendants "added to an existing action." Pet. Br. 8; *see also id.* at 21, 23. That alleged limitation, however, has no basis in the text of the Rule, which authorizes permissive joinder both at the outset of a lawsuit *and* afterwards. *See* Fed. R. Civ. P. 20 ("All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action."); *see also United States v. Mississippi*, 380 U.S. 128, 142 (1965) (multiple parties can be joined at the outset in a single action under Rule 20); *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 705 n.2 (1972) (additional parties can be brought into a case under Rule 20 joinder).

II. THE LEGISLATIVE HISTORY OF SECTION 1367 CANNOT AND DOES NOT OVERRIDE THE STATUTE'S PLAIN TEXT.

Because the plain text of Section 1367 unambiguously authorizes the exercise of supplemental jurisdiction over the claims of absent class members, and that result is not absurd, it is neither necessary nor appropriate to consult the legislative history in this case. Petitioners, however, essentially ask this Court to ignore the statute altogether, and to decide the case by reference to a single sentence and footnote from a committee report. Whatever the merits of consulting legislative history as a general matter, there is no basis for giving authoritative weight to an isolated passage that does not address or clarify any textual ambiguity. Indeed, careful examination of the whole legislative history actually *supports* the straightforward textual conclusion that the supplemental jurisdiction statute supersedes the result in *Zahn*.

A. The Legislative History Cannot Override the Statute's Plain Text.

As a threshold matter, it is inappropriate to consult the legislative history at all where, as here, the text of the statute is unambiguous and does not produce an absurd result. "When the words of a statute are unambiguous, . . . judicial inquiry is complete." *Connecticut Nat'l Bank*, 503 U.S. at 254 (internal quotation omitted); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947) ("There is . . . no ambiguity in this Act to be clarified by resort to legislative history.").

Where the meaning of a statute is plain, after all, consulting the legislative history can only create—not resolve—ambiguities. "[I]t is a poor cause that cannot find some plausible support in legislative history." Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 125 (1948). But courts are not free to circumvent the plain language of the statute by combing through the legislative history for contradictory statements. To the contrary, it has long been settled that legislative history is "only admissible to

solve doubt and not to *create* it." *Railroad Comm'n of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 589 (1922) (emphasis added); *see also United States v. Gonzales*, 520 U.S. 1, 6 (1997) (refusing "to resort to legislative history" that does not "clarif[y] the statute, [but] only muddies the waters.").

The fundamental flaw in petitioners' approach is their assumption that "[t]he purpose of statutory construction is to determine Congress's intent." Pet. Br. 33. Rather, the purpose of statutory construction is to determine the meaning of a statute. *See* Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means."). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank*, 503 U.S. at 254; *see also Caminetti*, 242 U.S. at 490 ("[T]he language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."). Petitioners thus err in pointing to the legislative history as the definitive repository of congressional "intent." Legislative history may clarify the meaning of an ambiguous law, but is not itself law. *See, e.g., Train v. City of New York*, 420 U.S. 35, 45 (1975) ("[L]egislative intention, without more, is not legislation."); *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989) ("Legislative history helps us learn what Congress meant by what it said, but it is not a source of legal rules competing with those found in the U.S. Code."). A contrary approach would violate the Constitution's most basic structural provisions, including the requirements of bicameralism and presentment. *See id.*

To be sure, it is not only possible but inevitable that Congress will occasionally enact laws that do not succeed in reflecting its true intent. "But in such case the remedy lies with the lawmaking authority, and not with the courts." *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982) (internal

quotation omitted); *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 64 (1953) ("[W]hen Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings subject matter into a statute, its word is final—save for questions of constitutional power which have not even been intimated here."). If a statute does not say what Congress meant, then Congress is free to amend the statute. *See, e.g., Conroy v. Aniskoff*, 507 U.S. 511, 528 (1993) (Scalia, J., concurring) ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it."); Ruth B. Ginsburg, *A Plea for Legislative Review*, 60 S. Cal. L. Rev. 995, 1013 (1987) ("Congress, few would disagree, can mend prescriptions of a nonsensational kind more efficiently and more decisively than courts can.") (internal quotation and brackets omitted). Courts have neither the constitutional power nor the institutional competence to enforce free-floating legislative "intent" divorced from the text of a statute.

B. The Legislative History on Which Petitioners Rely Does Not Purport to Clarify Any Textual Ambiguity.

Petitioners, however, contend that the legislative history is not only relevant but dispositive here. *See, e.g.*, Pet. Br. 11 n.3, *id.* at 19 n.6; *id.* at 22 n.9; *id.* at 25-33. In particular, they rely on a passage from the House Judiciary Committee Report on H.R. 5381, a bill that was ultimately subsumed into the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, the law that included Section 1367 among its many and varied provisions. The House Report analyzes the various provisions of the bill, including Section 114(b), the provision that became subsection (b) of Section 1367. The Report states that subsection (b) "prohibits a district court in a case over which it has jurisdiction founded solely on the general diversity jurisdiction, 28 U.S.C. § 1332, from exercising supplemental jurisdiction in specified circumstances." H.R. Rep. No. 101-734, at 29 (Sept. 10, 1990), 1990 U.S.C.C.A.N. 6860, 6875.

The Report then describes the operation of subsection (b), and concludes with the following sentence and footnote:

> The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*.[FN17]
>
> [FN17] *See Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 65 L. Ed. 673, 41 S. Ct. 338 (1921); *Zahn v. International Paper Co.*, 414 U.S. 291, 38 L. Ed. 2d 511, 94 S. Ct. 505 (1973).

In essence, petitioners' entire case boils down to the proposition that this Court should give the force of law to this sentence and footnote. But that sentence and footnote on their face do not support petitioners' interpretation of the supplemental jurisdiction statute. That sentence and footnote cite *Zahn* in the context of pointing out that subsection (b) is not intended to affect the "requirements of 28 U.S.C. § 1332," the diversity statute. This case, however, has nothing to do with the requirements for *original* jurisdiction under Section 1332; rather, this case is all about *supplemental* jurisdiction. As noted above, *see supra* note 5, the *Zahn* Court limited itself to the question whether a federal court could exercise *original* jurisdiction under Section 1332 over the claims of absent class members who did not individually satisfy the matter-in-controversy requirement; the Court did *not* address the distinct (but related) question whether a federal court could exercise common-law *ancillary* jurisdiction over those same claims. Accordingly, the sentence and footnote on which petitioners rely have no relevance to this case: respondents do not contend that the supplemental jurisdiction statute in any way altered *Zahn*'s explicit holding involving the original jurisdiction requirements of Section 1332.

In any event, even if the passage of legislative history on which petitioners rely could be interpreted to ratify *Zahn*'s

implicit holding on ancillary jurisdiction, that passage could not possibly override the statutory text. Although the "Members of this Court have expressed differing views regarding the role that legislative history should play in statutory interpretation," one point at least is common ground: this Court has "never given authoritative weight to a single passage of legislative history that is in no way anchored to the text of the statute." *Shannon v. United States*, 512 U.S. 573, 583 (1994). That is precisely the situation here. The sentence and footnote identified by petitioners in the legislative history do not purport to clarify any particular textual provision. Rather, the sentence and footnote simply declare a free-floating "intent" divorced from the text of the statute. "To give effect to this snippet of legislative history," as the *Shannon* Court explained, "we would have to abandon altogether the text of the statute as a guide in the interpretation process." *Id.*; *see also id.* at 583-84 ("'[C]ourts have no authority to enforce a principle gleaned solely from the legislative history that has no statutory reference point.'") (quoting *International Bhd. of Elec. Workers v. NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987) (Edwards, J.); brackets omitted); *Gonzales*, 520 U.S. at 6 (refusing to credit legislative history that "injects into [a statute] an entirely new idea . . . [that] is 'in no way anchored in the text of the statute.'") (quoting *Shannon*, 512 U.S. at 583)).

Indeed, the sentence and footnote from the legislative history on which petitioners rely are not only divorced from the text of the statute, but also inconsistent with petitioners' own "textual" theory. That sentence and footnote purport to describe the intention of subsection (b). But, as noted above at p. 11, petitioners' textual theory is squarely based on subsection (a). Petitioners can hardly claim that the sentence and footnote clarify any textual ambiguity in subsection (a) when the sentence and footnote do not even purport to describe that subsection. This Court has never ratified any such "mix-and-match" approach to legislative history.

To refuse to give the force of law to the snippet of legislative history on which petitioners rely is not to say to Congress: "'We know what you meant to say, but you didn't quite say it. . . . Gotcha! And better luck next time.'" Pet. Br. 36 (quoting *Russ v. State Farm Mut. Auto Ins. Co.*, 961 F. Supp. 808, 820 (E.D. Pa. 1997)). That approach presumes that what Congress "meant to say" is best expressed in the legislative history, not the statute itself. But that presumption runs contrary to our entire constitutional structure, in which both Houses of Congress pass legislation, and present it to the President for signature. The President, legislators, judges, and citizens all must rely on the premise that the law of the land is set forth in the U.S. Code, not in the U.S.C.C.A.N. The contrary position, in fact, would allow any congressional staffer (or interest group) to say "Gotcha!" to all other participants in the legislative process by simply slipping into the legislative history some statement contrary to the statute, and then asking the courts to enforce that statement as the true "intent" of Congress. It is impossible to overstate the danger to the rule of law from the proposition that a single statement in the legislative history can trump the plain text of a statute.

C. The Legislative History Actually Supports a Textual Interpretation.

Finally, it is worth noting that petitioners' description of the legislative history as "entirely one-sided," Pet. Br. 31, is inaccurate. To the contrary, examination of the legislative background of Section 1367 only underscores the conclusion that the statute means what it says. To the extent that analyzing the legislative history is like entering a crowded cocktail party and looking for one's friends, *see* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983), respondents' friends are at least as much in evidence here as petitioners'.

The supplemental jurisdiction statute was part of an overall package of legislative changes intended to improve the

operation of the American judicial system. "In November 1988, the 100th Congress created within the Judicial Conference of the United States a fifteen-member Federal Courts Study Committee and directed it, by April 2, 1990, to 'make a complete study of the courts of the United States and of the several States and transmit a report to the President, the Chief Justice of the United States, [and] the Congress . . . on such study." *Report of the Federal Courts Study Committee* 31 (Apr. 2, 1990) ("*Committee Report*"); *see also* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (Nov. 19, 1988).

The Committee, which was chaired by Judge Joseph F. Weis Jr., delegated its work to various subcommittees. *See generally* Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367*, 19 Seton Hall Legis. J. 157, 160 (1994). The issues of ancillary and pendent jurisdiction were assigned to the Subcommittee on the Role of the Federal Courts and their Relation to the States, which was chaired by Judge Richard A. Posner. *See* Report of the Subcomm. on the Role of the Federal Courts and Their Relation to the States, title page (Mar. 12, 1990), *reprinted in* Federal Courts Study Comm., 1 *Working Papers and Subcomm. Reports* (1990). In May 1989, this Court rendered its decision in *Finley v. United States*, 490 U.S. 545, 556 (1989), in which it refused to expand common-law pendent-party jurisdiction, and invited Congress to codify the law in this area.

The Subcommittee drafted a supplemental jurisdiction statute broadly similar to the one that was ultimately enacted. The draft statute provided as follows:

> (a) except as provided in subsections (b) and (c) or in another provision of this Title, in any civil action on a claim for which jurisdiction is provided, the district court shall have jurisdiction over all other claims arising out of the same transaction or occurrence, including claims that require the joinder of additional parties.
>
> (b) In civil actions under § 1332 of this Title jurisdiction shall not extend to claims by the plaintiff against parties joined under Rules 14 and 19 of the Federal Rules of Civil Procedure, or to claims by parties who intervene under Rule 24(b) of the Federal Rules of Civil Procedure, *provided*, that the court may hear such claims if necessary to prevent substantial prejudice to a party or third-party.
>
> (c) The district court may decline to exercise jurisdiction over a claim under subsection (a) if the claim presents a novel or complex issue of state law, state law issues predominate, or there are other appropriate reasons (including judicial economy, convenience, and fairness to litigants) to refuse jurisdiction.

1 *Working Papers* at 567-68. This draft established the overall structure of the provision that was ultimately enacted into law: the first subsection authorized supplemental jurisdiction to the limits of Article III, the second subsection carved out a number of express exceptions (*not* including the claims of absent class members under Rule 23), and the third subsection allowed courts to decline supplemental jurisdiction on a discretionary basis.

The draft statute is significant because the Subcommittee expressly acknowledged that its intention was to supersede *Zahn*. As the Subcommittee explained, [t]he proposal basically restores the law as it existed prior to *Finley*," with "[t]he exception . . . that our proposal would overrule the Supreme Court's decision in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973)." 1 *Working Papers* at 561 & n.33. "Although *Zahn* did not discuss pendent jurisdiction," the Subcommittee noted, "the lower courts have correctly understood it to preclude the joinder of claims for less than the requisite amount

in controversy to a claim that satisfies the requirement." *Id.* at 561 n.33. "From a policy standpoint, this decision makes little sense, and we therefore recommend that Congress overrule it." *Id.*

The Subcommittee then forwarded its recommendations to the full Committee. The Committee did not take any position on those recommendations, and did not draft a proposed statute, but simply included a brief and general discussion of supplemental jurisdiction in its overall report to Congress. *See Committee Report* at 47-48. (That discussion takes up just over a single page of the Committee's 188-page Report. *See id.*) The Committee did not address the *Zahn* case or any other issues relating to the exercise of supplemental jurisdiction in class actions. *See id.* Rather, the Committee simply expressed a general endorsement of supplemental jurisdiction, in sharp contrast to its overall hostility toward diversity jurisdiction. (The Committee recommended the virtual elimination of diversity jurisdiction. *See id.* at 38-42). "Abolishing or radically curtailing pendent and ancillary jurisdiction would eliminate some cases and claims from the federal courts, but this is a situation in which it is unwise to do so." *Id.* at 47. The Committee then recommended that Congress extend supplemental jurisdiction to the limits of Article III without even addressing the possibility of carving out certain claims to protect the traditional limitations of diversity jurisdiction. *See id.*[8]

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[8] Judge Weis (the Chairman of the Committee) has stated that "the Committee did not adopt the subcommittee's footnote reference to *Zahn*." *Meritcare, Inc. v. St. Paul Ins. Co.*, 166 F.3d 214, 219 (3d Cir. 1999); *see also id.* at 219 n.4. But that statement is misleading to the extent it implies that the Committee *rejected* the Subcommittee's recommendation. The Committee neither adopted nor rejected the Subcommittee's recommendation to overrule *Zahn*; the Committee Report is entirely silent on this point. (It is interesting to note that Judge Posner, in contrast to Judge Weis, has concluded that the supplemental jurisdiction statute as ultimately enacted did overrule *Zahn*. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997).)

Congress immediately rejected the Committee's proposal to virtually eliminate diversity jurisdiction, and drafted a bill designed to enact the Committee's less controversial recommendations into law. *See* Federal Courts Implementation Act, H.R. 5381, 101st Cong., 2d Sess. (July 26, 1990). The original language of that bill relating to supplemental jurisdiction was not based on, and differed substantially from, the language drafted by the Subcommittee. *See* Fairman, *Abdication*, 19 Seton Hall Legis. J. at 164-65. Concerned that this language would effectively overrule *Strawbridge*, the Committee Chairman, Judge Weis, testified during the half-day of hearings on that bill that the provision on supplemental jurisdiction should be replaced. *See Hearings Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice*, Ser. No. 124, 101st Cong., 2d Sess. 86, 94 (Sept. 6, 1990) (testimony of Judge Weis). Judge Weis offered an alternative provision that was substantially similar to the provision originally drafted by the Subcommittee. *Compare id.* (addendum), at 98 *with* 1 *FCSC Working Papers* at 567-68. *See generally* Fairman, *Abdication*, 19 Seton Hall Legis. J. at 166 ("The Weis alternative is basically a return to the earlier FCSC Subcommittee proposal.").

Following this hearing, the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Administration of Justice drafted a substitute supplemental jurisdiction section of the bill. *See* 136 Cong. Rec. H8256, H8262 (Sept. 27, 1990) (remarks of Rep. Kastenmeier). This substitute section essentially adopted the text proposed by Judge Weis, but inserted a clause in subsection (b) (underscored in the margin), that fixed Section 1367(b) in its final form. H.R. Rep. No. 101-734 at 11.[9] (Significantly, the

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[9] "(b) DIVERSITY CASES.- In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons

(continued...)

new clause placed additional restrictions on the availability of supplemental jurisdiction in diversity cases, but still contained no exception for Rule 23 class actions.) The substitute section on supplemental jurisdiction was drafted by three law professors, Thomas D. Rowe, Jr., Stephen B. Burbank, and Thomas M. Mengler, who had an interest in the subject. *See* Fairman, *Abdication*, 19 Seton Hall Legis. J. at 168-69 & n.68.

The House Subcommittee accepted the law professors' draft, and reported the bill favorably without any discussion of supplemental jurisdiction. *See id.* at 170. The bill later passed the entire House without any discussion of supplemental jurisdiction. *See id.* In the Senate, the bill was subsumed into an omnibus bill, the Judicial Improvements Act of 1990, which was taken up and passed on a single day without any discussion of supplemental jurisdiction. *See id.* The President thereafter signed the bill without any discussion of supplemental jurisdiction. *See id.*

In this context, it is fanciful for petitioners to assert that "Congress *actually and specifically intended*" to preserve the result in *Zahn*. Pet. Br. 6 (emphasis in original). To the contrary, "[o]ne inescapable conclusion of this survey of the development of [statute] is the general *absence* of congressional concern over the impact and merits of this statute." Fairman, *Abdication,* 19 Seton Hall Legis. J. at 172 (emphasis added); *see also id.* ("The House Subcommittee on Courts provided little oversight. . . . [T]he committee abdicated to the academics."). The statute was "rushed through the legislative gauntlet without meaningful review or discussion," Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life after* Finley *and the Supplemental Jurisdiction Statute*, 40 Emory L.J. 445, 486 (1991), and was

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[9] (...continued)
proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332."

not evaluated by the American Law Institute or any other professional organization. Even the three professors who drafted the supplemental jurisdiction provision concede that "the process afforded by Congress [on the proposed legislation] was meager." Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *A Coda on Supplemental Jurisdiction,* 40 Emory L.J. 993, 1005 (1991).

Petitioners, however, purport to discern congressional "intent" to retain *Zahn* in the House Report. But the relevant provisions of that Report, like the supplemental jurisdiction statute itself, "can be attributed to the efforts of [Profs.] Rowe, Burbank, and Mengler." Fairman, *Abdication,* 19 Seton Hall Legis. J. at 170. And these professors concede that "on its face, section 1367 does not appear to forbid supplemental jurisdiction over claims of class members who do not satisfy section 1332's jurisdictional amount requirement, which would overrule *Zahn v. International Paper Co.*, 414 U.S. 291 (1973)." Thomas D. Rowe, Jr., Stephen B. Burbank & Thomas M. Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 Emory L.J. 943, 960 n. 90 (1991). Unlike petitioners in this case, in fact, the professors make no pretense at arguing that this straightforward textual interpretation is incorrect. Rather, the drafters explain that "[i]t would have been better had the statute dealt explicitly with this problem, and *the legislative history was an attempt to correct the oversight.*" *Id.* (emphasis added). While Profs. Rowe, Burbank, and Mengler may not have wanted to supersede *Zahn*, they at least recognized that the statute on its face actually did so.[10]

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[10] The professors cannot resist going on to assert that "[t]he resulting combination of statutory language and legislative history . . . creates the delicious possibility that despite Justice Scalia's opposition to the use of legislative history, he will have to look to the history or conclude that section 1367 has wiped *Zahn* off the books." Rowe, *et al.*, *Compounding or Creating Confusion*, 40 Emory L.J. at 960 n. 90 (1991). Indeed, the
(continued...)

The evolution of the supplemental jurisdiction statute thus refutes petitioners' assertion that there is "not a shred of evidence in the legislative history" contrary to their position. Pet. Br. 9. The statute as ultimately enacted is identical in all relevant respects to the draft prepared by the Federal Courts Study Commission Subcommittee that was expressly intended to overrule *Zahn*. Rather than a "deafening" silence regarding an intention to supersede *Zahn*, Pet. Br. 33, the legislative history thus reveals a specific intention to do just that, even if that intention was not shared by the three professors who drafted the final revisions to the bill and the relevant portions of the House Report. In this regard, this case is far easier than *International College of Surgeons*, where this Court gave the supplemental jurisdiction statute a straightforward textual interpretation that had the revolutionary (and apparently unforseen) effect of sweeping into federal court state-law claims for on-the-record review of local administrative action. *See* 522 U.S. at 172-72; *see also id.* at 176 (Ginsburg, J., dissenting) ("The Court's expansive reading . . . takes us far from anything Congress conceivably could have meant."). Here, Congress not only "could have meant" to supersede *Zahn*, but key participants in the legislative process demonstrably *did* mean to do so.

In the final analysis, petitioners' invitation to this Court to give the legislative history precedence over the text of the supplemental jurisdiction statute would undermine the very clarity and consistency the statute was designed to promote. As this Court explained in *Finley*, "what is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the

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[10] (...continued)
professors—who believe that the appropriate way to "correct" a perceived statutory deficiency is simply to express a counter-textual intent in the legislative history—caustically recommended to their critics "readings on the legislative process that include more than the writings of Justice Scalia." Rowe, *et al.*, *Coda*, 40 Emory L.J. at 1005 n.59.

effect of the language it adopts." 490 U.S. at 556. The cardinal interpretive rule, of course, is that Congress must express its intention in the statutory text. *See, e.g., Connecticut Nat'l Bank*, 503 U.S. at 254. To the extent the statutory text requires a different result than the thicket of common-law rules it replaced, the text controls. *See, e.g., Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587-88 (1993); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259, 262-63 (1993). "Now that Congress has codified the supplemental jurisdiction in § 1367(a), courts should use the language of the statute to define the extent of their powers." *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d 379, 385 (7th Cir. 1996).

Indeed, giving the legislative history the force of law would open a veritable pandora's box of inconsistencies and ambiguities, and would make this area of the law even more confusing than before the enactment of the statute. Courts and citizens must be able to rely on the statute as a complete and accurate expression of the scope of federal subject-matter jurisdiction. Indeed, the need for clear and simple rules is particularly compelling in the area of jurisdiction, because few things are more wasteful than litigation about jurisdiction. *See, e.g.*, Freer, *Close Enough*, 40 Emory L.J. at 1007 (rules of federal subject-matter jurisdiction "ought to be as clear and capable of near-mechanical application [as] possible"). Accordingly, as in *International College of Surgeons*, this Court should reaffirm that the supplemental jurisdiction statute means what it says.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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IN THE

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ROBIN FREE and RENEE FREE,

Petitioners,

v.

ABBOTT LABORATORIES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTRODUCTION

To accept the Fifth Circuit's view, this Court would have to conclude that Congress, in enacting 28 U.S.C. § 1367, intended to make a change in clear pre-existing law by overturning the settled rule of diversity jurisdiction set forth in *Zahn v. International Paper*, 414 U.S. 291 (1973). Respondents cannot and do not advance any reason to conclude that Congress intended to make such a change. Indeed, Respondents do not dispute that the whole congressional policy of steadily limiting diversity jurisdiction over cases otherwise tried in state courts — and the specific reinforcement of those limits in Section 1367(b) — is profoundly inconsistent with the results produced by the Fifth Circuit view they defend: a dramatic expansion of the number and magnitude of diversity suits in which plaintiffs lacking an independent basis for federal jurisdiction piggyback their way into federal court using Federal Rules 20 and 23.

Respondents, accordingly, must rest their argument entirely on the assertion that the language of Section 1367(a) simply gives this Court no choice but to hold that Congress made a change of law that it manifestly did not intend to make. That argument, however, is incorrect. Section 1367(a)'s language requires "original jurisdiction" as a predicate to any supplemental jurisdiction. By adopting (as effectively a matter of first impression) a proper and natural understanding of the matter-in-controversy requirement of the diversity statute, 28 U.S.C. § 1332, this Court would avoid attributing to Section 1367(a) a result that Congress plainly did not intend. That is what this Court should do.

In particular, Section 1367 provides that federal courts must have original jurisdiction before the exercise of supplemental jurisdiction is appropriate. 28 U.S.C. § 1367(a). In the diversity context, this means that the matter-in-controversy requirement must be met. 28 U.S.C. § 1332(a). Properly understood, the matter-in-controversy requirement operates in the same way as the complete diversity requirement: just as all plaintiffs in a

civil action must be diverse from all defendants in order for there to be original federal jurisdiction over any part of the action, all plaintiffs also must have claims that meet the jurisdictional minimum or else original jurisdiction is lacking over the entire action. There is no way to "half-satisfy" the matter-in-controversy requirement; either all plaintiffs have the amount in controversy, and there is original jurisdiction over the entire civil action, or not all plaintiffs meet the requirement, and jurisdiction over the entire action is lacking. Under that straightforward reading of Section 1332 — treating the matter-in-controversy requirement in parallel with the complete-diversity requirement — there would be no original jurisdiction over a class action involving unnamed plaintiffs lacking the amount in controversy, and so there would be no occasion for the exercise of supplemental jurisdiction under Section 1367(a), thus preserving *Zahn*. Not surprisingly, Respondents effectively acknowledge that their case depends on rejecting this interpretation of the matter-in-controversy requirement of Section 1332 and treating it differently from the complete-diversity requirement.

Respondents' only argument for their contrary view is to rely on several precedents allowing dismissal of parties with jurisdictionally insufficient claims in order to permit the case to go forward. But, critically, that result provides no basis whatsoever for supporting one rather than the other of the two possible views of the matter-in-controversy rule: the result is proper if the requirement bars original jurisdiction over the claims of any party until the improper parties are dropped (as they may be, *see* Fed. R. Civ. P. 21; *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832-33 (1989)); and it is also proper if the requirement defeats jurisdiction over the claims of just the improper parties. Those decisions thus did not in any way turn on resolving the precise nature of the matter-in-controversy rule. With the enactment of Section 1367, however, an important concrete consequence now turns on the proper characterization of Section 1332's matter-in-controversy rule.

The view of that rule proposed by Petitioners should be adopted, not only because it treats the matter-in-controversy rule similarly to the complete-diversity rule, but because it permits Section 1367 to function coherently and because it accurately reflects the absence of any congressional intent to overturn *Zahn*.

ARGUMENT

I. THE REQUIREMENTS OF PARTICULAR ORIGINAL-JURISDICTION STATUTES DETERMINE WHETHER THERE IS ORIGINAL JURISDICTION AS A PREDICATE FOR SUPPLEMENTAL JURISDICTION UNDER SECTION 1367.

Section 1367 by its express terms requires original jurisdiction as a prerequisite to the exercise of supplemental jurisdiction. *See* 28 U.S.C. § 1367(a) ("in any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction" over certain other claims). That language directs the party invoking supplemental jurisdiction, at the threshold, to turn to the statutes conferring original jurisdiction and show that the action meets the conditions for original jurisdiction set forth in the original-jurisdiction statutes. Respondents' argument rests on the contention that, regardless of which original-jurisdiction provision is invoked, there is original jurisdiction whenever "'original jurisdiction' over some *claim or claims*" exists *and* that determination is always independent of what other claims or parties are present. Resp. Br. at 9 (emphasis added). But that position is plainly incorrect, for the presence of original jurisdiction over *any* claim, for *some* jurisdictional provisions, *does* turn on what other claims or parties are in the action.

This is concededly so for the complete-diversity requirement. Respondents admit:

> with respect to the complete diversity requirement [of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1807)], it is true that the presence of a single plaintiff

> who is a citizen of the same State as a single defendant defeats jurisdiction over the *entire* action, at least where the relevant parties are indispensable.

Resp. Br. at 14 (emphasis added); *see Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 387 (1998) ("Where original jurisdiction rests upon Congress' statutory grant of 'diversity jurisdiction,' this Court has held that one claim against one nondiverse defendant destroys that original jurisdiction."); *cf. Finley v. United States*, 490 U.S. 545, 553 n.6 (1989) (interpreting Federal Tort Claims Act to provide district courts no authority to decide a "case" that includes a claim against a private defendant "since the FTCA provides jurisdiction only for claims against the United States.")[1] Accordingly, there is no original jurisdiction over any claim where Section 1332 is invoked but complete diversity is lacking. That is why Section 1367(a) leaves the complete-diversity rule unimpaired. Otherwise, original jurisdiction over a particular diverse plaintiff would trigger supplemental jurisdiction over non-diverse plaintiffs, obliterating the complete-diversity rule.

In contrast, original jurisdiction based on Section 1331 does take claims one at a time. This Court's decision in *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156 (1997), confirms that fact, which is as well-established for Section 1331 as the opposite approach is for the complete-diversity requirement. Federal question jurisdiction exists over a particular claim arising under federal law regardless of what other claims are in the case, and the federal-question jurisdiction is limited to that claim: as the Court explained, that is the necessary premise of Congress's provision of "supplemental" jurisdiction over other claims in the case. *Id.* at 166.

1. Respondents' Amicus Product Liability Advisory Council ("PLAC") also concedes this point: " 'A case falls within the federal district court's 'original' jurisdiction only if diversity of citizenship among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same State.' " PLAC Amicus Br. at 13 (*quoting Wisconsin Dep't of Corrections*, 524 U.S. at 388).

Accordingly, it is clear that original jurisdiction sometimes is determined by looking at a particular claim in isolation and sometimes it is not. The question in this case is whether the matter-in-controversy rule of diversity jurisdiction is better understood as being like the complete-diversity rule or as being like the federal-question rule. The better answer is that it is like its companion Section 1332 rule, so that original jurisdiction over some plaintiffs' claims cannot be assessed independently of all other plaintiffs' claims. For original jurisdiction to exist at all, it is the entire set of plaintiffs that must have the required amount in controversy, just as it is the entire set of plaintiffs that must be diverse from the defendants.[2]

II. UNDERSTANDING THE MATTER-IN-CONTROVERSY RULE TO REQUIRE THAT ALL PLAINTIFFS HAVE THE JURISDICTIONAL AMOUNT IS IN ACCORD WITH PRIOR DECISIONS OF THIS COURT.

Respondents contend that it would be "flatly inconsistent with settled law" to hold that the claims of each plaintiff in a diversity action must satisfy the jurisdictional minimum in order for there to be original jurisdiction at all. Resp. Br. at 12. Respondents base this contention primarily on the fact that the typical remedy in cases where some plaintiffs have met the jurisdictional minimum and others have not has been to dismiss those plaintiffs with claims for less than the jurisdictional amount. *See, e.g., Clark v. Paul Gray*, 306 U.S. 583, 590 (1939). But even Respondents effectively recognize that the conclusion they urge cannot be drawn from the remedial practice they identify.

As Respondents concede in the complete-diversity context, "the Court can cure a lack of complete diversity by simply dismissing a non-diverse party and retaining original jurisdiction over the rest of the action." Resp. Br. at 15 n.4; *see* Fed. R. Civ.

2. This conclusion, specific to only two requirements of a single basis of federal-court jurisdiction that historically has been subject to limitation as matter of congressional policy, does not render supplemental jurisdiction "superfluous." Resp. Br. at 11.

P. 21; *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829 (1989); *see also Wisconsin Dep't of Corrections*, 524 U.S. at 388. Similarly, a federal court can cure a failure of original jurisdiction in the matter-in-controversy context by the simple expedient of dismissing those parties without the requisite amount. This cure does *not* mean that the court had federal jurisdiction over any of the parties prior to the dismissal of the parties lacking the jurisdictional amount. To the contrary, as discussed above, it is clear in the complete-diversity context that the opposite is true. *See Wisconsin Dep't of Corrections*, 524 U.S. at 388; *Newman-Green, Inc.*, 490 U.S. at 829; *accord* Fed. R. Civ. P. 21 (courts may correct misjoinder that otherwise would defeat jurisdiction and require dismissal of the action by dropping or adding parties). Respondents' invocation of the remedial cases thus proves nothing.

Perhaps recognizing the logical flaw in their first position, Respondents also seek precedential support in *Zahn v. International Paper*, 414 U.S. 291 (1973), contending that, although *Zahn* rejected original jurisdiction, it "did not address the distinct (but related) question" of whether, after finding that the named plaintiffs had the jurisdictional minimum, a federal court "could thereafter exercise common-law ancillary jurisdiction over the absent class members." Resp. Br. at 19. But that reading of *Zahn* is inconsistent with the result in the case. The Court in *Zahn* had to reject the exercise of ancillary jurisdiction over class members with claims for less than the jurisdictional amount or it would have had to reverse the denial of class certification. *Zahn*, 414 U.S. at 291.

The *Zahn* opinion does not explicitly explain *why* ancillary jurisdiction was inappropriate, and it can, therefore, hardly mandate Respondents' position even at the level of rationale. In fact, the opinion supports Petitioners' view of the matter-in-controversy rule more than Respondents'. The *Zahn* opinion suggests that the nature of the matter-in-controversy rule precluded ancillary jurisdiction over plaintiffs with claims for less than the jurisdictional minimum because of a lack of original

jurisdiction that left the original jurisdiction predicate for the exercise of ancillary jurisdiction unsatisfied. The *Zahn* majority explicitly stated that "this case is governed by the rationale of this Court's prior cases construing the statutes defining the jurisdiction of the District Court." *Id.* at 292. The only statute "defining the jurisdiction of the district court" that was relevant to the case was Section 1332, and specifically the matter-in-controversy requirement. This explanation suggests that the Court was rejecting the use of ancillary jurisdiction *because* the operation of a rule of original jurisdiction precluded original jurisdiction itself (leaving no predicate for any invocation of ancillary jurisdiction).

That conclusion is bolstered by the Court's very silence about ancillary jurisdiction (despite the discussion of ancillary jurisdiction in the dissent, *see Zahn*, 414 U.S. at 305 (Brennan, J., dissenting)). If the Court had been relying on a principle that ancillary jurisdiction was lacking even though there was original jurisdiction, it would have been a then-novel principle. When, three years after *Zahn*, the Court did base its decision on such a principle, analyzing particular jurisdictional statutes to preclude supplemental jurisdiction despite original jurisdiction, it stated as much explicitly. *See Aldinger v. Howard*, 427 U.S. 1 (1976). In particular, in *Aldinger*, the Court addressed and rejected a contention that common law pendent-party jurisdiction was available over plaintiffs asserting claims related to an action that *was* within the district court's original jurisdiction under 28 U.S.C. § 1343. *Id.* at 17-18.[3] In *Zahn* there is no comparable discussion, and *Zahn* is therefore most naturally read to rest on its simplest basis: that original jurisdiction itself could

3. The Court in *Aldinger* also extensively analyzed a series of cases addressing the issue of when the exercise of pendent jurisdiction was appropriate, and did not ever mention *Zahn* — a further indication that the supplemental jurisdiction issue in *Zahn* was controlled by an original jurisdiction rule unique to the diversity context. *See Aldinger*, 427 U.S. at 6-16.

not be established independently of and as a predicate to ancillary jurisdiction over the unnamed class members.

In sum, Petitioners' understanding of the matter-in-controversy rule makes sense of the language of *Zahn* and of the majority's decision not to discuss ancillary jurisdiction. It also places the matter-in-controversy requirement in accord with the other requirement of 28 U.S.C. § 1332, the complete-diversity requirement, which requires that all plaintiffs be diverse from all defendants in order for courts to have original jurisdiction over the civil action.[4] Far from being "flatly inconsistent with settled law," Petitioners' understanding of the matter-in-controversy rule is in accord with the relevant decisions of this Court.

III. INTERPRETING THE MATTER-IN-CONTROVERSY REQUIREMENT AS MANDATING THAT ALL PLAINTIFFS SATISFY THE JURISDICTIONAL MINIMUM RESULTS IN A COHERENT SUPPLEMENTAL JURISDICTION SCHEME.

As Petitioners set forth in their opening brief, Respondents' interpretation of Section 1367 leads to results that are unquestionably absurd. *See* Pet. Br. at 23-25. Under Respondents' reading of Section 1367, Plaintiffs with claims for less than the jurisdictional minimum could freely join a

4. Respondents' contention that *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), somehow mandates a contrary result is unconvincing. *See* Resp. Br. at 21. As this Court has recognized, the expansive reading courts have given to *Ben-Hur* (which dealt only with a situation where ancillary jurisdiction over non-diverse class members was necessary to dispose of trust assets before the Court, *see Ben-Hur*, 255 U.S. at 366) makes it all the more important that the matter-in-controversy rule be interpreted narrowly. *See Snyder v. Harris*, 394 U.S. 332, 340 (1969) (in light of *Ben-Hur*, "[t]o allow aggregation of claims where only one member of the entire class is of diverse citizenship could transfer into the federal courts numerous local controversies involving exclusively questions of state law.").

single plaintiff with the jurisdictional amount at the outset of the action under Fed. R. Civ. P. 20, even though Section 1367(b) would bar those very same individuals from joining or intervening in the action under Federal Rules 19 or 24. Respondents do not dispute that such a result is nonsensical, but they attempt to brush it off by stating that "this case is about the exercise of supplemental jurisdiction over claims under Rule 23, not Rule 20." Resp. Br. at 23.

That answer is not good enough. The interpretation of the matter-in-controversy rule of Section 1332 that is directly at issue here has consequences for the application of Section 1367 in both class actions and non-class actions. Rule 20 (applied to joinder of plaintiffs) is as missing from Section 1367(b) as is application of Rule 23. The incoherence of the consequences for non-class actions where plaintiffs are joined under Rule 20 — an incoherence not disputed by Respondents — necessarily weighs against Respondents' view of the proper characterization of the matter-in-controversy rule. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994) (consequences of interpretation beyond those occurring specifically in the case *sub judice* to be considered in deciding whether to adopt particular statutory interpretation). Petitioners' characterization of the matter-in-controversy rule would avoid that incoherence because the presence of plaintiffs with claims for less than the jurisdictional amount would defeat original jurisdiction at the outset, leaving no predicate for the invocation of supplemental jurisdiction.

Respondents conclude their one-page discussion of the nonsensical results of their construction by summarily stating that the anomalies Petitioners have described "do not give courts license to ignore the plain text of the statute." Resp. Br. at 23. That response is simply a diversion. As already explained, Section 1367(a) expressly requires resort at the outset to the requirements of the pertinent original-jurisdiction provision, and Petitioners' characterization of the matter-in-controversy rule

of Section 1332 is fully consistent with all relevant statutory text. No statutory text requires the incoherence Respondents promote.

IV. READING THE MATTER-IN-CONTROVERSY RULE TO REQUIRE THAT ALL PLAINTIFFS HAVE CLAIMS SATISFYING THE JURISDICTIONAL MINIMUM AVOIDS ATTRIBUTING TO CONGRESS A MANIFESTLY ABSENT INTENT TO OVERTURN *ZAHN*.

While Respondents and their *amici* spend considerable time attempting to establish that Congress rationally *could have* intended Section 1367 to overrule *Zahn*, they never seriously contend that Congress *actually meant* for Section 1367 to overturn the settled rule of *Zahn* and thus to effect a dramatic expansion of the number of diversity cases brought into federal court (originally or by removal). Regardless of what Congress could rationally have meant to do, no reasonable observer could conclude that Section 1367 was meant to overturn *Zahn*. Because Petitioners' understanding of the matter-in-controversy rule, as well as of Section 1367(a)'s prerequisite of original jurisdiction, actually reflects congressional intent that *Zahn* not be overruled, it should be preferred.

A. The Structure And Operation Of Section 1367 As It Applies To Diversity Cases Makes It Clear That Congress Did Not Intend To Overrule *Zahn*.

It is ludicrous to believe that Congress meant Section 1367 to operate as Respondents contend, because accepting Respondents' argument requires the conclusion that Congress meant to draft an incoherent statute. It cannot be that Congress intended to invite plaintiffs lacking the requisite jurisdictional sum to join state-law actions in federal court for convenience using Rule 20, while simultaneously preventing plaintiffs lacking the jurisdictional amount from intervening in or joining state law actions in federal court to protect their interests using

Rules 19 or 24. *See* 28 U.S.C. § 1367(b). Congress did not intend to lock all of the windows of the federal courthouse while leaving the front door wide open.

Respondents, sensibly, never argue this point directly, and instead treat the omission of Rule 23 from Section 1367(b) as perhaps a drafting error, and contend that this Court should not presume to correct congressional drafting errors, but should leave that to Congress. *See* Resp. Br. at 26. But Petitioners have, in fact, set forth a permissible interpretation of Section 1367(a), as well as of Section 1332, that produces a coherent result consistent with evident congressional policy. In the face of such an interpretation, resort to a "drafting mistake" conclusion is unnecessary and inappropriate. Indeed, Respondents themselves undermine their premise that the exclusion of Rule 23 from Section 1367(b) was a drafter's mistake. They observe that even the language they assert Congress would have adopted if it had wanted to preserve the *Zahn* rule — namely, including Rule 23 in the list of enumerated exceptions in Section 1367(b) — would not have prevented the absurd results created by Respondents' analysis of the statute. Resp. Br. at 23 ("The anomaly identified by Petitioners would not be solved by the addition of Rule 23 to subsection (b)."). So, as Respondents admit, in order to accept their understanding of Section 1367 and the matter-in-controversy rule, this Court would have to conclude that Section 1367(a) contains not one but two major drafting errors — the exclusion of both Rule 23 and Rule 20 (as applied to the joinder of plaintiffs) from Section 1367(b)'s list of enumerated exclusions. The far better conclusion is not that Congress was so sloppy, but that Congress had the same understanding of the matter-in-controversy rule as Petitioners, an understanding that made it unnecessary to include a reference to the application of Rules 20 and 23 to plaintiffs' claims. This Court should not read the statute so as to require acceptance of multiple major errors; rather, the result available under the statutory language and reflecting the clear intent of the structure of Section 1367 as a whole is the result to be preferred. *See United States v.*

Hartwell, 73 U.S. 385, 6 Wall. 385, 396 (1868) (in construing statute court should adopt that sense of words which best harmonizes with context and promotes policy and objectives of legislature) (*cited in King v. St. Vincent's Hospital*, 502 U.S. 215, 221 n.10 (1991)).

B. The Legislative History Confirms That Congress Did Not Intend To Overrule *Zahn*.

The legislative history of Section 1367, fairly read, confirms what the language and structure of the statute already make clear: Section 1367 was not meant to overturn *Zahn*. Respondents' argument about the legislative history does not even purport to establish the contrary. Respondents have shown nothing to undermine Petitioners' straightforward contention with regard to the legislative history: that what it says, and what it *does not* say, confirm what the language and structure of Section 1367 already show, namely, that Congress did not intend to change settled pre-existing law by overturning *Zahn*.[5]

Respondents' discussion of the legislative history, instead, piggybacks on their only real argument in the case, namely, that the result they urge is unavoidably compelled by the statutory text, which, Respondents say, legislative history cannot overcome. Thus, Respondents have to mischaracterize Petitioners' legislative history argument, stating that Petitioners "ask this Court to ignore [Section 1367] altogether, and decide the case by reference to a single sentence and footnote from a committee report." Resp. Br. at 24. But, as already explained,

5. Indeed, all three circuit courts that have discussed the legislative history of Section 1367, regardless of whether the court eventually held *Zahn* overturned, have concluded that the legislative history indicates that Section 1367 was not meant to overrule *Zahn*. *See Meritcare, Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 220-21 (3d Cir. 1999); *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640 (10th Cir. 1998); *Free v. Abbott Labs. Co.*, 51 F.3d 524, 528 (5th Cir. 1995); *see also Russ v. State Farm Mutual Ins.*, 961 F. Supp. 808, 814 (E.D. Pa. 1997) (discussing legislative history).

the premise that Petitioners' position ignores the text of Section 1367 is entirely wrong. Remove that premise, and Respondents have essentially nothing to say about either the incoherent results produced by their reading of Section 1367 or about the statute's legislative history.

The legislative history in this case is supportive of a result that is consistent with the statutory language and that avoids otherwise undisputed incoherence. *Cf. Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) ("I think it entirely appropriate to consult all public materials, including the background of Rule 609(a) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of . . . ."). Indeed, it is so manifestly clear that Congress had no intent to change pre-existing law that well-established principles of construction — completely ignored by Respondents — would themselves require rejection of the Fifth Circuit's holding.[6] In the end, however, no such question need be confronted. The matter-in-controversy rule of Section 1332, clearly referenced in diversity cases by Section 1367's original jurisdiction prerequisite, can and should be read in a way that reflects the clear message of the legislative history that Congress had no intent to change the rule of *Zahn*.

6. As Petitioners set forth in their opening brief, *see* Pet. Br. at 36, where the text of a statute, literally applied, would "produce a result demonstrably at odds with the intentions of its drafters," then "the intention of the drafters, rather than the strict language, controls." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989); *Ardestani v. INS*, 502 U.S. 129, 135-36 (1991) (same); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987) (same); *Griffin v. Oceanic Contractors*, 458 U.S. 564, 571 (1982) (same); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (same). Thus, even if this Court accepted Respondents' position on the text of Section 1367, and concluded that the statute was neither ambiguous nor absurd, it would still be appropriate to overturn the decision below because it is contrary to clearly expressed congressional intent. Respondents are completely silent on this authority.

Respondents' description of the statute's history, to the extent it conveys any lesson at all, reinforces that conclusion. Respondents must reach well past anything said by a congressional committee or member of Congress to point to the fact that a Subcommittee (the "Study Subcommittee") of the Federal Courts Study Committee (the "Study Committee") initially proposed a version of Section 1367(a) that used claim-specific language and that the Study Subcommittee stated was intended to overrule *Zahn*. *See* Resp. Br. at 30.[7] But, as Respondents concede, this initial draft was not even considered, let alone accepted, by any Committee of Congress or Congress as a whole, for the simple reason that the Study Committee's report to Congress did not include the text of the Study Subcommittee's proposed statute. *See* Resp. Br. at 33-35.

Instead, Congress "immediately rejected" the Study Committee's controversial proposals. *See id.* at 33. After hearings, and further drafts, the House Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Administration of Justice drafted what became Section 1367. *Id.* As Respondents concede, it was this bill (and not any earlier drafts) that was considered by Congress and passed into law. *See id.* at 34. Contrary to Respondents' contention, this final version of the bill is not "identical in all relevant respects to the draft prepared by the [Study] Subcommittee." *Id.* Rather, the drafters of the final version did not choose the claim-specific language of the Study Subcommittee's proposal, *see* note 7, *supra*, so that the statute contains a

7. The proposal used language different from the ultimate language of Section 1367(a), apparently trying to make all original jurisdiction based on individual claims in isolation: "in any civil action *on a claim for which* jurisdiction is provided" supplemental jurisdiction over related claims may be appropriate." Resp. Br. at 30 (emphasis added). But this language, which Respondents mirror in their own rewrite of Section 1367, *see* Resp. Br. at 9, was not accepted by any congressional committee, let alone by the entire Congress.

broader original jurisdiction predicate for supplemental jurisdiction: what is required is original jurisdiction over the "civil action." *See* 28 U.S.C. § 1367. The broader language indicates, if anything, a rejection of any intent to overturn *Zahn* through claim-specific language.

In any event, the very brevity of the consideration given to Section 1367 by the full Congress renders Respondents' claim that Congress meant to overturn *Zahn* completely implausible. As this Court has recognized in another context, it is extremely unlikely that Congress would pass a statute that it understood to overturn settled Supreme Court jurisprudence, expand a historically disfavored form of federal jurisdiction at the expense of state sovereignty, and sharply add to the burdens of the federal judiciary, with little discussion, no debate, and no positive indication of any such intent. *See American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613-14 (1991) ("If this amendment had been intended to place the important limitation on the scope of the Board's rulemaking powers that petitioner suggests, we would expect to find some expression of that intent in the legislative history."). This silence, in this context, is surely telling. "Judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." *Harrison v. PPG Indus.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)

Moreover, Respondents' view of the legislative history is belied by the relevant congressional committee's specific and final statement that it did not intend for Section 1367 to alter the *Zahn* result, which it viewed as a requirement of original jurisdiction, citing Section 1332. *See* Pet. Br. at 29-30. Respondents contend that this Court should ignore this plain statement of intent because it is "divorced from the text of the statute." Resp. Br. at 28. But this analysis misconceives Petitioners' argument. Petitioners contend that the legislative history demonstrates that Congress did *not* intend to overrule *Zahn*; there is no reason to expect that this *absence* of intent would be tied to particular language in the statute. Indeed, it

would defy common sense to require that Section 1367 set forth all of the things Congress did *not* intend the statute to do.

In addition, even accepting Respondents' premise, their analysis is incorrect. Section 1367's reference to original jurisdiction over a "civil action" refers the reader to the applicable jurisdiction-conferring statute, in this case 28 U.S.C. § 1332. The terms of Section 1332, as construed by this Court, then control the outcome of this case, because it is Section 1332's language that determines whether the federal courts have original jurisdiction in diversity cases. The House Committee's statement that it did not intend *Zahn* to be overruled is thus a statement of how the House Committee interpreted the original jurisdiction requirements of Section 1332, including the matter-in-controversy requirement. Given that this interpretation is in accord with the statutory language, supported by the relevant case law, reflects a long history of years of congressional policy limiting diversity jurisdiction, and allows Section 1367 to operate coherently, there is no reason this Court should not give effect to this clearly expressed congressional intent.

V. SECTION 1367 DOES NOT SUPPLY THE CLEAR CONGRESSIONAL MANDATE REQUIRED TO EFFECT THE MAJOR EXPANSION IN THE NUMBER OF DIVERSITY CASES THAT OVERTURNING *ZAHN* WOULD PRODUCE.

This Court has repeatedly stated that it will not expand the reach of diversity jurisdiction absent a clear congressional mandate to do so. *See Snyder*, 394 U.S. at 339 ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the [diversity] statute has defined.") (*quoting Healy v. Ratta*, 292 U.S. 263, 270 (1934)). This canon of interpretation is of a piece with the general rule that jurisdictional statutes must be construed narrowly because federal courts are courts of limited jurisdiction. *See, e.g., Finley*, 490 U.S. at 550;

cf. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985) (where "the courts themselves must decide whether their own jurisdiction has been expanded . . . we rely only on the clearest indications in holding that Congress has enhanced our power"). Respondents do not (and cannot) point to any such clear congressional mandate. To the contrary, their whole argument regarding the proper characterization of the matter-in-controversy rule rests on the jurisdictional remedy stated in *Zahn* and its forbears that, as set forth above, cuts neither way.

Respondents suggest that their interpretation of Section 1367 would not expand diversity jurisdiction, but would only increase the reach of supplemental jurisdiction. *See* Resp. Br. at 20. This suggestion is a patent distraction from the real jurisdictional stakes. This Court's decision to accept Respondents' interpretation of Section 1367 would greatly expand the use of diversity jurisdiction, vastly increasing both the number and size of diversity cases being decided in federal court because (as Respondents' *amici's* enthusiasm makes clear) many defendants faced with class actions in state court would remove those actions to a federal forum. Indeed, in nearly all cases, one of the parties would prefer a federal forum, meaning that the large majority of cases that fall within federal diversity jurisdiction will be filed in or removed to federal court. This would have the inevitable result of increasing the number of times federal courts will be forced to decide questions of state law better and more appropriately addressed by the state courts. Such a result is inconsistent with two centuries of congressional policy. Accordingly, this Court should now, as it has in the past with Congress's approval, resolve any doubts about the proper interpretation of Sections 1367 and 1332 in favor of limiting the reach of federal power in diversity cases.

In sum, Petitioners' understanding of Section 1367 and its interrelationship with the matter-in-controversy rule is in accord with the plain language of Section 1367, sensibly construes Section 1332 to give parallel treatment to its complete-diversity

and matter-in-controversy rules, is consistent with the prior decisions of this Court, and permits statutory coherence. Respondents instead invite this Court to read Section 1367's reference to original jurisdiction effectively to attribute to Congress an intent to overturn settled law and create an incoherent jurisdictional scheme that Congress manifestly did not have. Because the statute is easily read to avoid such a result, this Court should decline that invitation.

CONCLUSION

For the foregoing reasons, and the reasons stated in Petitioners' opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

ROBIN FREE AND RENEE FREE,

Petitioners,

v.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB COMPANY AND MEAD-JOHNSON & COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE STATE OF LOUISIANA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The Louisiana Attorney General is statutorily and constitutionally charged with the duty of enforcing Louisiana laws. Thus, the State of Louisiana, through its Attorney General, has an important interest in preserving for Louisiana courts matters of Louisiana law which profoundly affect the economic welfare of its citizens as well as the Attorney General's ability to enforce that law in the manner intended by the Louisiana Legislature and its courts.

The *Free* courts' erroneous interpretations of that law stand as a significant impediment to that enforcement, particularly when a rule of substantive law has been declared operative in Louisiana by federal courts with no authority to do so. Such an ultra vires act offends principles of comity and federalism and robs both the Louisiana Legislature and its courts of their sovereign authorities. In addition, it tends to encourage anticompetitive behavior in a state with only limited resources to fight it.

The matters of whether federal antitrust law preempts state antitrust statutes and whether the federal policies of *Illinois Brick* may be used to declare rules of state law have been litigated previously and decided in the states' favor in *California v. ARC America*. While Louisiana does not have an *"Illinois Brick repealer"* as did the plaintiff states in that case, according to *Erie* principles, Louisiana had no duty to enact one, although antitrust defendants appear to have been successful in convincing federal lower courts, but not state courts, otherwise.

The 5th Circuit's decisions stand in contravention of other federal and state principles of law as well. No transcendental body of law outside of any particular state exists which is obligatory within it unless and until changed by statute. *Erie* at 79, 823. (A federal court may not substantially affect the enforcement of the right as given by the State. *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956); *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108, 65 S.Ct. 1464, 1469, 89 L.Ed. 2079)); (Federal antitrust law does not control Louisiana antitrust law. *LP&L v. United Gas Pipe Line Co.*, 493 So.2d 1149, 1158 (La. 1986)); (The public policy of a state is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the court. In Louisiana, the only authentic and admissible evidence of public policy of a state on any given subject is its Constitution, laws, and judicial decisions. Where the state has spoken through its legislators, there is no room for speculation as to what the policy of the state is. *State v. American Sugar Refining Co.*, 138 La. 1005, 1021, 71 So.137, 142-143 (La. 1916)). (Legislatively enacted statutes trump policy considerations. *State, ex rel. Ieyoub v. Brunswick Bowling and Billiards Dover, Inc.*, 665 So.2d 520, 522 (La. App. 5th Cir. 1995), *writ denied*).

In addition, the *Free* decision(s), have caused the people of Louisiana to be placed in an inferior economic position among their sister states, a harm frowned upon by this Court in [*Snapp v. Puerto Rico*, 486 U.S. 592, 605-606, 102 S.Ct. 3260, 3268, 73 L.Ed.2d 995 (1982); and in *Georgia v. Penn. R. Co.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945)], in this case and in a case now in litigation by the Attorney General, by placing limits on

Louisiana statutes, not intended by the Louisiana Legislature or its courts, and by affecting the state's ability to obtain full legal redress for serious antitrust violations perpetrated upon its citizens in *The State of Connecticut, et al., v. Mylan Laboratories, et al.*, Cv. No. 98-3115 (TFH), in the United States District Court for the District of Columbia. A copy of that court's order is presented in the Appendix.

The *Free* court expressly sought to teach the Louisiana Legislature and its courts a legally impermissible lesson in antitrust enforcement by collaterally overruling Louisiana jurisprudence.

For these reasons, the State of Louisiana, through its Attorney General, has an important legal stake in this matter.

SUMMARY OF ARGUMENT

No federal original jurisdiction exists in this matter; therefore, no supplementary jurisdiction exists. The failure to certify a class in these error-riddled decisions before removal, before considering Art. III standing and before reaching the merits, are factors fatal to these decisions. The 5th Circuit failed to realize that a critical standard for judging if removal is proper is whether the case could have been filed originally in federal court. 28 USCA 1367 does not overrule *Zahn* or any other federal principle of law. The lower courts erred in applying a Louisiana procedural class action statute to hypothesize jurisdiction over a technically non-existent class and thereby, bootstrapping this case into federal court, to

reach its merits. And, once the federal courts seized jurisdiction by overruling principles of federal law, they failed to apply Louisiana law as intended by its legislature and courts; they chose, instead, to collaterally overrule Louisiana jurisprudence as well.

ARGUMENT

BACKGROUND PROBLEMS WHICH PERVADE THIS CASE

To find diversity jurisdiction and thus, removal jurisdiction in this matter by using a Louisiana procedural class action statute (so classified by Louisiana Courts in *Dumas v. Angus*, 635 So.2d 446, 451 (La. App. 2nd Cir. 1994) and *Ford v. Murphy Oil USA, Inc.*, 703 So.2d 542, 544 (La. 1997), the 5th Circuit overruled sub-silentio principles of law contained in the *Erie* doctrine and its progeny, now codified at 28 U.S.C. § 1652, as well as numerous other federal principles of law found in numerous cases of this Court, and federal statutory law. Similarly, in reaching its decision that 28 USCA 1367 overruled *Zahn*, the 5th Circuit also overlooked cardinal principles of statutory interpretation and principles of law found in other pertinent decisions of this Court.

Even if no other statutory law or *stare decisis* jurisprudence were involved, common sense and the plain meaning of words dictate that because supplementary jurisdiction means jurisdiction *in addition to* original jurisdiction, supplemental jurisdiction does not and cannot exist without original jurisdiction.

In addition, the 5th Circuit failed at every try to grasp the fundamental principles of Louisiana law. And, to compound its error further, using hypothetical jurisdiction to reach the merits of this state law case, the 5th Circuit forced the lower court to seize jurisdiction of this matter, seemingly to collaterally overrule Louisiana cases adjudicating principles of Louisiana antitrust law. By all of these acts, the 5th Circuit overstepped its constitutional authority and ruled contrary to its controlling precedent, thus committing what this Honorable Court has previously termed ultra vires acts.

A. No federal original jurisdiction exists in this matter; therefore no supplementary jurisdiction exists.

No federal original jurisdiction exists in this matter; therefore no supplementary jurisdiction exists.

1. Failure to certify a class before removal, before Art. III considerations and before reaching the merits are fatal to these decisions

At the outset, it must be noted that at the time of removal in this matter, no class had been certified, under either state law or federal law. (Case filed in state court on 10/14/93, removed on 11/26/93, no class certified as of 6/21/94, Opinion: Ruling on Motion for Reconsideration, Plaintiffs' App. K, at p. 93a). Both State and Federal Procedural Rules demand class certification before further proceedings can begin. [Court certification is prerequisite to further proceedings or dismissal, Art. 593.1 of the La. C.C.P.) (FRCP Rule 23(a) and (b) require court certification before further proceedings)]. Without such

court certification, the lower federal courts embarked upon issuing advisory opinions, which are fatal to the case at bar. (The federal district court also refused to certify a settlement class in its attempt to remand this matter to state court where it properly belongs).

Moreover, because class certification was lacking, no class existed at the time of removal. Thus, on removal, amounts in controversy for diversity jurisdiction could not be based upon a technically non-existent class, whether under state or federal law.

This Court has already made clear in at least three cases that class certification issues are logically antecedent to the existence of any Art. III issues, much less merits issues, and it is appropriate to reach them first. *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Caterpillar v. Lewis,* 519 U.S. 61, 73, 117 S.Ct. 467, 475, 136 L.Ed.2d 437 (1996) (28 USCA 1441(a) requires that the case be fit for federal adjudication at the time the removal petition is filed); and in *Ortiz v. Fibreboard Corp.,* 119 S.Ct. 2295, 2397, 144 L.Ed.2d 715 (1999), the propriety of class certification would be addressed before the issue of Art. III standing).

Thus, it appears that the 5th Circuit circumvented the controlling precedent in the case at bar by incorrectly reaching Art. III standing and the merits of the case without even looking at the propriety of the Louisiana class. This issue, alone, warrants vacating the lower courts' judgments in this matter and remanding the case to Louisiana state court.

"Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same

thing as an advisory opinion, disapproved by this Court from the beginning." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 118 S.Ct. 1003, 1016, 140 L.Ed.2d 210 (1998), citing *Muskrat v. U.S.,* 219 U.S. 346, 362, 31 S.Ct. 250, 256, 55 L.Ed. 246 (1911) and *Hayburn's Case,* 2 Dall. 409 (1792).

2. This case could not have been filed originally in federal court under federal principles of law

Although the issue of original federal jurisdiction was not presented to this Court by petitioners, the issue of supplementary jurisdiction cannot be reached properly without considering it, because it is the foundation of the latter. It is conferred and invoked by constitutional authority supported by statutes. No court can proceed without it.

The failure of parties to urge objections [to diversity of citizenship] cannot relieve this court from the duty of ascertaining from the record whether the Circuit Court could properly take jurisdiction of this suit . . . The rule is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. *Carden v. Arkoma Assocs.,* 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990), quoting *Mansfield,* C. & L.M.R.

Longstanding decisions of this Court make clear that in a removal case, the issue in subsequent proceedings on appeal is whether the federal district court would have

had original jurisdiction of the case had it been filed in that court. *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S.Ct. 523, 529, 139 L.Ed.2d 525 (1997); *Caterpillar v. Lewis*, 519 U.S. 61, 72, 117 S.Ct. 467, 474-475, 136 L.Ed.2d 437 (1996).

The case at bar could not have been filed originally in federal court because no plaintiff would have met the $50,000 (then) jurisdictional amount. This statement is true because the federal court could not have resorted, then, to Louisiana procedural law, but would have been forced to rely entirely on La. R.S. 51:137, pursuant to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 260 FN 31, 95 S.Ct. 1612, 1623, FN 31, 44 L.Ed.2d 141 (1975), and federal law to determine the amounts in controversy. (In diversity action where the state law is not counter to a valid federal statute, state law giving a right to attorneys' fees should be followed). While the cited Louisiana substantive law statute awards attorneys' fees to successful plaintiffs, it is silent on the method of distribution of those attorneys' fees in class actions, in this case technically a non-existent class, thus, a hypothetical one.

On the other hand, the federal principles of the common fund doctrine as set forth in *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 749, 62 L.Ed.2d 676 (1980), make clear that in federal court, attorneys fees are assessed against the entire fund recovered in class actions, and are spread proportionately among those benefited by the suit. Thus, not even the representative plaintiffs could have met the jurisdictional amount and the suit could not have been filed originally in federal court.

The *Free* courts erroneously relied on a Louisiana procedural statute, Art. 595 of the Louisiana Code of Civil Procedure, to bootstrap the action into the federal courts, particularly obvious because only a hypothetical class existed. As noted above, Louisiana courts classify this statute as procedural, rather than substantive. In so doing, not only did the courts fail to interpret Louisiana law properly, they also overlooked or overruled sub-silentio, principles of federal law as well.

Louisiana law requires that its statutes be applied *in pari materia*, a principle of law based on Art. 13 of the Louisiana Civil Code, which is always followed by Louisiana courts. *Comm-Care Corp. v. Bishop*, 696 So.2d 969 (La. 1997); *Shelton v. Chrysler First Financial Services Corp.*, 676 So.2d 591, 592 (1996); *Kellis v. Foster*, 523 So.2d 846 (La. 1988).

The 5th Circuit should have examined La. Code of Civ. Proc. Art. 4 regarding subject matter jurisdiction in *pari materia* with Art. 595, because a federal court interpreting state law must determine state law "with the aid of such light is afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law." *Salve Regina College v. Russell*, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991); *Meredith v. Winter Haven*, 320 U.S. 228, 238, 64 S.Ct. 7, 13, 88 L.Ed. 9 (1934).

At the time that the first appeal was decided in this matter, 1995, Art. 4 provided that *except as otherwise provided by law*, the amount in dispute includes attorney's fees, for subject matter jurisdiction purposes. This provision should have waved a red flag because federal law

provided the otherwise. FRCP 82 provides that the rules cannot be interpreted to expand jurisdiction and the federal rules, in this case, diversity and removal jurisdiction, must be interpreted with Art. 3 of the United States Constitution in mind.

Another red flag should have been apparent to the 5th Circuit in its determination that federal original jurisdiction existed. In 1995, Art. 4 of the La. C.C.P. was amended to now provide that attorney's fees *could not* be used to determine the amount in dispute for subject matter jurisdiction. This amendment would have been pending in the Legislature at the time of the 5th Circuit's first decision and was in effect at the time of both the second and third. Where the law has changed during the pendency of a suit and retroactive application of the new law is permissible, the new law applies on appeal even though it requires a reversal of a trial court judgment which was correct under the law in effect at the time it was rendered. *Segura v. Frank*, 630 So.2d 714, 725 (La. 1994). Thus, reliance on a Louisiana procedural statute is a precarious undertaking in Louisiana because, *contrary to federal law*, Louisiana law holds that procedural laws apply both retrospectively and prospectively based upon Art. 6 of the Civil Code. *Keith v. United States Fidelity & Guaranty Co.*, 694 So.2d 180, 183 (La. 1997); *Segura v. Frank*, 630 So.2d 714, 720-721, (La. 1994).

Federal law holds, on the other hand, that a presumption exists against retrospective effect and Congressional statutes, i.e., including procedural ones, are given prospective effect only. *Martin v. Hadix*, 119 S.Ct. 1998, 2003, 2006, 2008, 144 L.Ed.2d 347 (1999); *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S.Ct. 1483, 1497, 128

L.Ed.2d 229 (1994); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 842-844, 855-856, 110 S.Ct. 1570, 1579-1581, 1586-1587, 108 L.Ed.2d 842 (1990).

The diversity jurisdictional statute, is narrowly construed. *Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700, 703, 78 L.Ed. 1248 (1934). The jurisdictional statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104, 61 S.Ct. 868, 870, 85 L.Ed. 1214 (1941); *Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 357, 81 S.Ct. 1570, 1575, 6 L.Ed.2d 890 (1961). The Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from state to federal courts. *Shamrock*. Hence, these cases, like the *Erie* line of cases, prohibit the use of a local law, like Art. 595 of the La. C.C.P., to determine federal jurisdiction, particularly, when the class was merely hypothetical vis-à-vis, lack of certification.

The 5th Circuit should have been further cautioned against using a state procedural law to determine federal jurisdiction by the principles of law contained in *Hanna v. Plumer*, 380 U.S. 460, 474-475, 85 S.Ct. 1136, 1145, 14 L.Ed.2d 8 (1965), which held directly on point that "to hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." And further, "*Erie* recognized that there should not be two conflicting systems of law controlling the primary

activity of citizens . . . " *Id.* The foregoing were reasons given why federal courts sitting in diversity apply federal procedural rules and state substantive law. *Id.* at 465, 1141.

"The requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception.' " *Ruhrgas Ag v. Marathon Oil Company,* 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (quoting *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 119 S.Ct. 1003, 140 L.Ed.2d 210 (1998) and *Mansfield, C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 383, 4 S.Ct. 510, 28 L.Ed. 462 (1884)); for " 'jurisdiction is power to declare the law,' " and " 'without jurisdiction the court cannot proceed at all in any cause.' " *Id.* (quoting *Steel Co.* and *Ex parte McCardle,* 7 Wall. 506, 514, 19 L.Ed. 264 (1868)).

Every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Steel Co.,* at 1003, quoting *Mitchell v. Maurer,* 293 U.S. 237, 244, 55 S.Ct. 162, 165, 70 L.Ed. 338 (1934). When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.' *Id.,* quoting *United States v. Corrick,* 298 U.S. 435, 440, 56 S.Ct. 829, 831, 80 L.Ed. 1263 (1936) and *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S.Ct. 1055, 1071, 137 L.Ed.2d 170 (1997), quoting from *Bender v. Williamsport Area School Dist.,* 475 U.S. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501 (1986).

For removals that are defective because of lack of subject matter jurisdiction, remand may take place without such a motion (to remand) and at any time. *Wisconsin Department of Corrections v. Schacht,* 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998).

Were it in truth a contention that the District Court lacked jurisdiction, we would be obliged to consider it, even as we are obliged to inquire sua sponte whenever a doubt arises as to the existence of federal jurisdiction. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1997), quoting *Liberty Mutual Ins. Co. v. Wetzel,* 424 U.S. 737, 740, 96 S.Ct. 1202, 1204, 47 L.Ed.2d 435 (1976), and *Louisville & Nashville R.Co. v. Mottley,* 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908).

The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 432, 116 S.Ct. 2211, 2222, 135 L.Ed.2d 659 (1996).

Fed. Rule Civ. Proc. 82 provides that the rules shall not be construed to extend . . . the [subject matter] jurisdiction of the United States district courts. *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 613, 117 S.Ct. 2231, 2244, 138 L.Ed.2d 689 (1997).

Yet, despite this plethora of long standing Supreme Court precedent, the federal 5th Cir. Court of Appeal chose to overrule all of these decisions *sub silentio,* by holding instead, in *Free v. Abbott Laboratories,* 264 F.3d 270, 272 (1999), that "(a)lthough appellants' argument bears

on federal courts' jurisdiction, this is not an issue that we will reconsider."

B. 28 USCA 1367 does not overrule *Zahn* or any other principle of federal law. Indeed, to find federal jurisdiction in the case, the court was required to overrule many more principles of law than just those found in *Zahn*

Using machiavellian analysis, the 5th Circuit in its first decision, erroneously held that 28 USCA 1367 overrules *Zahn* by interpreting a Congressional statute contrary to Congressional intent; that *Colorado River* abstention did not apply and reached a bizarre crescendo in holding that because the representative parties in *Free* would be compelled to remain in federal court with the same claims adjudicated, the interests of comity would not be served. This forced analysis springs from the federal courts' initial errors, *inter alia*, applying a Louisiana procedural class action statute to a hypothetical class, thereby overruling sub-silentio the *Erie* doctrine, 28 USCA 1652, and FRCP 82.

1. Interpreting a Congressional statute contrary to Congressional intent is an ultra vires act

In a long litany of cases, this Honorable Court has made crystal clear that the federal courts do not sit as a super-legislature to determine the wisdom of legislation or to decide policy, *Day-Brite Lighting, Inc. v. State of Missouri*, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 98 L.Ed. 469 (1952); *Griswold v. State of Connecticut*, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965); *New Orleans v.*

Duke, 427 U.S. 297, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976). Further, courts cannot assume that Congress did not know what it was doing, as the 5th Circuit expressly assumed, when it interpreted 28 USCA 1367 as overruling *Zahn*. *Cannon v. University of Chicago*, 441 U.S. 677, 696-697, 99 S.Ct. 1946, 1957-1958, 60 L.Ed.2d 560 (1979); *U.S. Railroad Ret. Board v. Fritz*, 449 U.S. 166, 179, 101 S.Ct. 453, 461, FN2, 66 L.Ed.2d 368 (1980); *Albernaz v. U.S.*, 450 U.S. 333, 340, 101 S.Ct. 1137, 1143, 67 L.Ed.2d 275 (1981).

To so interpret a statute expressly against the intent of Congress, is in itself tantamount to an ultra vires act. The 5th Circuit noted its awareness that Congress did not intend to change the jurisdictional requirements of 28 U.S.C.A. 1367 in the 1995 *Free* decision. Thus, to interpret it as overruling *Zahn*, is also tantamount to an ultra vires act.

Such an act offends fundamental principles of separation of powers, as does pronouncing upon the meaning of a state statute without jurisdiction, an act condemned as an act ultra vires in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 1012, 1016, 140 L.Ed.2d 210 (1998) and *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 119 S.Ct. 1563, 1569, 143 L.Ed.2d 760 (1999). Further, as held in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2236, 138 L.Ed.2d 689 (1997), the federal rules of civil procedure must be interpreted in keeping with Art. III (Constitution) constraints, with the Rules Enabling Act, which instructs that the rules of procedure "shall not abridge, enlarge or modify and substantive right", and with FRCP 82 which provides that the rules shall not be constructed to extend the subject matter jurisdiction of the United States federal district

courts. The 5th Circuit's interpretation of 28 USCA 1367 extends the jurisdiction of the federal district courts, in direct contravention of that rule.

Moreover, the 5th Circuit's ruling means that the court believes it proper to aggregate claims in the procedural class action device to determine jurisdiction. However, in *Carden v. Arkoma*, 494 U.S. 185, 192, 110 S.Ct. 1015, 1020, 108 L.Ed.2d 157 (1990), this Court held that "looking to the citizenship of only some of the members of an artificial entity finds even less in our precedent than looking to the State of organization" when interpreting the federal diversity statute. "We have never held that an artificial entity, sued or being sued in its own name, can invoke the diversity jurisdiction of the federal courts based upon the citizenship of some but not all of its members."

Similarly, not the plain language of 28 USCA 1367, Congressional intent, nor this Court's precedent, allow the invocation of the diversity jurisdiction of the federal courts based upon jurisdictional amount being met by some plaintiffs, but not all, using a state procedural standard. Consistency requires that the jurisdictional amount of the matter in controversy be interpreted in the same manner. Even though a class entity exists, each individual member should be required to meet the jurisdictional amount like each must meet the diversity requirement, to invoke federal diversity jurisdiction.

Defendants' reliance on *Supreme Tribe of Ben Hur v. Cauble*, 225 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921) is misplaced because *Ben Hur* was filed originally in federal court, unlike the case at bar which was prematurely

removed from state court, and the case contained principles of federal law, giving the federal courts in that matter a strong federal interest, again, dissimilar to the case at bar.

Thus, the 5th Circuit engaged in "hypothetical jurisdiction" to reach the merits of the case. As held in *Steel Company*, cited supra at page 1016, the statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

2. Principles of comity and federalism should have prevented the lower federal courts from seizing jurisdiction and collaterally overruling Louisiana

In truth, the federal court for the Middle District of Louisiana tried to avoid adjudicating this matter. It was forced to do so by the 5th Circuit's first appellate decision. The 5th Circuit erroneously found jurisdiction on the representative plaintiffs and refused to allow the lower court to abstain, based again, on faulty use of authority. The Fifth Circuit held that Colorado River abstention did not apply because "only exceptional circumstances, the 'clearest of justifications' can suffice under *Colorado River* to justify the surrender of federal jurisdiction," quoting *Moses Cone*, 460 U.S. at 25-26, 103

S.Ct. at 942. However, unlike the case at bar, in the *Cone* case, federal issues of law were present, as this Court made clear in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 707, 729, 116 S.Ct. 1712, 1727, 135 L.Ed.2d 1 (1996). Here, there are none.

This Court has also made crystal clear that 28 USCA 1367(c) discretion is independent from any abstention doctrine theory which *requires* district court to abstain or stay, in *City of Chicago,* cited supra, at page 534. The case at bar presented issues of state law in which the important state interest could be undermined by inconsistent rulings from the federal and state courts and those interests have importance beyond the case. Inconsistent rulings have indeed already occurred. In *State v. Bordens, Inc.*, 684 So.2d 1024, 1025 (La. App. 4th Cir. 1996), the facts as stated by the Court reveal that the State filed a treble damages action based upon a federal criminal judgment of antitrust bid-rigging, on behalf of school systems (direct purchasers) and Louisiana school children (indirect purchasers). The lower court held that the Louisiana Monopolies Act allowed such actions. The defendants chose not to appeal this issue.

In *State of Connecticut v. Mylan,* a multistate antitrust case in litigation in federal courts, referenced above and found in the State's Appendix, the federal district court held that La. R.S. 51:128 authorizes Louisiana, through its Attorney General, to sue for violations of the Monopolies Act and found that provision to be unlimited in equitable relief, totally ignoring La. R.S. 51:138 which mandates that the Attorney General file all actions under the Act and La. R.S. 51:1414, which grants to the Attorney General the right to pursue any action under any statute

available to any other party. The Court found itself unable, vis-à-vis the *Free* decision, to follow Louisiana law and Louisiana jurisprudence. Such a holding, similar to that of the 5th Circuit, defies logic, reason and common sense and has no place in a country purporting to follow the rule of law.

Principles of comity and federalism should have ruled the day, as well as 28 USCA 1367(c) authorized discretion.

C. The Fifth Circuit's Determination of State Law was Erroneous on Federal as Well as State Law Grounds

The Fifth's Circuit's determination of Louisiana law was erroneous on federal as well as state law grounds.

1. Erroneousness based on federal law grounds

Obviously, the 5th Circuit did not feel competent to rule on issues of state law as expressed by their attempted certification of certain issues to the Louisiana Supreme Court. When that failed, the court decided the Louisiana indirect purchaser issue along federal grounds, expressly forbidden by this Court in *California v. ARC America Corp.*, 409 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989). (It is improper to consider Congressional policies as defining what federal law allows states to do under their own antitrust law. Nothing in *Illinois Brick* suggests it would be contrary to congressional purposes for states to allow indirect purchasers to recover under their own laws, at pgs. 102, 1666).

Sadly, the 5th Circuit in *Free* espoused the losing positions of the *California v. Arc America* defendants rather than follow its precedent; thus, overruling it sub-silentio. The 5th Circuit erred in holding that *California* does not advocate increasing penalties on antitrust defendants or maximizing Louisiana plaintiffs' recovery as compared with federal law remedies. *California,* in fact held that based upon the *Silkwood v. Kerr-McGee* case neither Congress nor the courts frown upon additional liability, over and above that authorized by federal law. (*California,* at pgs. 105, 1667).

The 5th Circuit further erred by holding that the *Illinois Brick* scheme of recovery is preferable to Louisiana law. A court cannot sit as a super-legislature. *Day-Brite Lighting, Inc.* and *Griswold,* cited supra. Further, as Justices Brennan, Marshall, Blackmun and Stevens have so eloquently stated previously in concurrence with the decision *Snapp,* cited supra at page 3271, a state is a sovereign entity, entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention. I know of nothing – except the Constitution or overriding federal law – that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State's assertion of sovereign interest. Yet, superimposing its judgment for that of Louisiana was exactly the forbidden action taken by the *Free* court.

The 5th Circuit's clear alternative to avoid such was discretional refusal to hear the case, a position expressly advocated in *California.* Instead, it chose to embark on issuing advisory opinions through ultra vires acts and sub-silentio overruling its clear precedent.

While Louisiana law does not contain what is popularly known as an *Illinois Brick* repealer as did the plaintiff states in *California,* because it is not obliged to follow federal law, the principles of *California* apply equally to this matter, pursuant to the principles of *Erie.* Under *Erie v. Tompkins,* 304 U.S. 64, 79, 58 S.Ct. 817, 923, 82 L.Ed. 1188 (1938), no transcendental body of law outside of any particular State exists which is obligatory within it unless and until changed by statute. Thus, the 5th Circuit's focus should have been on whether the Louisiana Legislature was obligated to amend its already unlimited antitrust law. Similarly, a federal court may not substantially affect the enforcement of a right as given by the state. *Bernhardt v. Polygraphic Co. of America, Inc.,* 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956); *Guaranty Trust Co. of New York v. York,* 326 U.S. 99, 108, 65 S.Ct. 1464, 1469, 89 L.Ed. 2079 (1945).

Thus, the 5th Circuit's holdings overruled sub-silentio this Court's controlling precedent.

2. Erroneousness based on state grounds

The concept of granting a dispensation from liability to a class of defendants based upon the level of market participation by plaintiffs is as foreign to Louisiana law as is granting a dispensation based upon a per se rule of non-liability. Louisiana tort law speaks of absolute and strict liabilities. To hold that such a concept rules Louisiana law is to overrule collaterally Louisiana's Civil Code, its statutory law and its jurisprudence, and to deny its very existence as a sovereign entity. Our courts have held that the plain language of the Louisiana Monopolies Act

and its Unfair Trade and Consumer Protection Act must be given effect by the Courts of this State.

Ultra vires acts of judgment undermine the sovereign authority of the State of Louisiana as held by its Supreme Court in *Louisiana Power & Light*, cited and discussed infra, and have been disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. Further, these ultra vires acts are forbidden by Art. III concerns as noted by this Court in *Steel* and *Ruhrgas*, cited infra. The 5th Circuit failed to analyze state law according to state principles.

The 5th Circuit erroneously held that *Louisiana Power & Light v. United Gas Pipeline Co*, 493 So.2d 1149 (La. 1986) was distinguishable from its case at bar. The situation is exactly the same in *Free* as in *LP&L*, the existence of controlling Louisiana court precedent, which keeps the particular principle of federal antitrust law from applying in Louisiana. To reach the conclusion that indirect purchasers cannot recover under Louisiana law, in the face of *LP&L*, no other explanation seems justified, except that, the 5th Circuit collaterally and sub-silentio overruled important principles of Louisiana law and its jurisprudence.

The 5th Circuit court erroneously held that *LP&L* held *only* that the federal interpretation of federal antitrust law has a persuasive effect on Louisiana law. To stop at this juncture was to overrule the case sub-silentio and collaterally. The *LP&L* Louisiana Supreme Court, in fact, held at pages 1157, 1160 that while persuasive, the federal law is not controlling and refused to apply to Louisiana antitrust law, a then recent decision of the United States

Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). A significant and fatal gap exists in the 5th Circuit's version.

The 5th Circuit further erroneously held that the issue of the plain meaning of the remedy statute while "superficially formidable," can be overcome with federal policy considerations. However, the Louisiana Supreme Court held in *LP&L*, at page 1154, that appropriate statutory analysis begins with an examination of the language of the statute and that La. R.S. 51:122 is sweeping in its breadth. Words and phrases *shall be* read with their context and *shall be* construed according to the common usage. And at page 1159, this Court does not choose, . . . an inflexible approach which adopts a per se rule of nonliability . . . Such a choice would run counter to the Legislature's intent in enacting the antitrust legislation and divest our courts of the authority which reposes in them by virtue of this legislation.

An indirect purchaser exclusion from the broad sweep of the Louisiana antitrust law would be a per se rule of nonliabilty exactly like the kind the Court has been so eloquent in condemning and refusing to apply in Louisiana. Thus, either the 5th Circuit overruled *LP&L* collaterally and sub-silentio, or its principles were simply beyond the court's perception. Either way, the 5th Circuit's error-riddled decisions should be vacated.

The *in pari materia* rule of legislative construction further requires that Louisiana's Unfair Trade and Consumer Protection Act, which is a statute having the same purpose as the Louisiana Monopolies Act, be read in

conjunction with the latter, because it forbids unfair competition as well. The former act expressly allows consumers, or indirect purchasers, to recover for unfair methods of competition. Thus, the plain language of both statutes expressly allow indirect purchaser actions, and must be given effect by the Courts of this State. *State v. Classic Soft Trim, Inc.*, 663 So.2d 835 (La. App. 5th Cir. 1995), *writ denied*, Jan. 26, 1996.

Besides superimposing its judgment over Louisiana's *LP&L* decision, the 5th Circuit also overruled other decisions of Louisiana courts to reach its erroneous conclusions regarding Louisiana law. In *State, ex rel. Ieyoub v. Brunswick Bowling Dover, Inc.*, 665 So.2d 520, 522 (La. App. 5th Cir. 1995), *writ denied*, 667 So.2d 1053 (1996), the Louisiana appellate court held that Louisiana statutes trump policy considerations. In *State v. American Sugar Refinery, Inc*, 238 La. 1005, 1021, 71 So. 137, 142-143 (La. 1916), the Louisiana Supreme Court held that the only authentic and admissible evidence of the public policy of a state on any given subject are its Constitution, laws, and judicial decisions. In *Jenkins v. Waste Management of Louisiana, Inc.*, 709 So.2d 848 (La. App. 3rd Cir, 1998), *writ denied*, May 15, 1998, the Louisiana appellate court held that Louisiana jurisprudence leaves no question but that restraints to free trade shall not be tolerated under any guise. And see analysis of *State v. Bordens, Inc.*, discussed supra at page 18., regarding indirect purchaser status of Louisiana school children as indirect purchasers allowed right to recovery.

Thus, to hold that Louisiana indirect purchasers have no right to recovery in the face of this jurisprudence, is to overrule the cases both collaterally and *sub-silentio*.

In addition, in the second *Free* ruling to justify the first, the 5th Circuit held that the law of the case doctrine granted it a dispensation from redetermining original jurisdiction. The 5th Circuit, then, attempted to use, a Louisiana decision, *In re Gas Water Heater Prods. Liab. Litig.*, 711 So.2d 264 (La. 1998), ignoring federal jurisprudence, to justify its seizure of jurisdiction. The problem, however, is that even if federal law would allow such, which it does not, it appears that the 5th Circuit completely misunderstood the text of the cases and principles of law involved.

The 5th Circuit held, that *Gas Water Heater* "reinforced" its position that it could exercise subject matter jurisdiction, because the Louisiana Appellate Court distinguished the *Free* case in making its ruling. The Louisiana appellate position held that in a class action, claims could not be aggregated for jurisdictional purposes, following the federal rule of *Zahn*, and (failing to follow the 5th Circuit's). The case further noted that the federal court for the Eastern District of Louisiana limited the holding in *Free*. (This jurisprudence does not support the 5th Circuit's position).

The Louisiana Supreme Court rejected this position and held the opposite, that, contrary to federal law, such class action claims could be aggregated for jurisdictional purposes, to keep the matter out of a court of limited jurisdiction peculiar to the Jefferson Parish Louisiana court system. The court reasoned that a class action is not a series of individual claims, but rather is merely the claim of one entity, the class. This position also fails to support the 5th Circuit's because the controlling federal decisions hold that subject matter jurisdiction must be

decided on federal grounds, regardless of state law. Louisiana law has never held that individual claims could not be aggregated for jurisdictional purposes. Thus, another conflict exists between state and federal laws.

Finally, alluding to *HMC Management Corp. v. New Orleans Basketball Club*, 375 So.2d 700, 706-07 (La.App. 4th Cir. 1979), was improper as well, because that decision was influenced by *Flood v. Kuhn*, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972), which adjudicated the "baseball exemption to the antitrust laws."

CONCLUSION

For all of the foregoing reasons, the judgment of the 5th Circuit should be reversed in its entirety.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION, **Plaintiff,** **v.** **MYLAN LABORATORIES, INC., CAMBREX CORP., PROFARMACO S.R.L., and GYMA LABORATORIES OF AMERICA, INC.,** **Defendants.**	**Cv. No. 98-3114 (TFH)**
THE STATE OF CONNECTICUT, *et al.*, **Plaintiffs,** **v.** **MYLAN LABORATORIES, INC., CAMBREX CORP., PROFARMACO S.R.L., GYMA LABORATORIES OF AMERICA, INC., and SST CORP.,** **Defendants.**	**Cv. No. 98-3115 (TFH)** **(Filed Dec. 14, 1999)**

OPINION

The above-captioned cases are actions by the Federal Trade Commission (FTC) and thirty-three States against Mylan Laboratories and other drug companies for various federal and state law antitrust violations. On July 7, 1999, this Court issued a Memorandum Opinion granting in part and denying in part defendants' motions to dismiss. The Opinion addressed issues of federal law and the various antitrust and consumer protection laws of the plaintiff states. Sixteen of the plaintiff states have moved for reconsideration of the Court's ruling in respect to various issues decided under their state laws.[1] Two of the states seeking reconsideration – Ohio and Kentucky – have also asked this Court to certify the questions of state law to their highest state courts. After careful consideration of plaintiffs' motion and the opposition thereto, the motion will be granted in part and denied in part.

I. BACKGROUND

The plaintiff states request that this Court reconsider a number of its rulings in respect to the states' antitrust and consumer protection laws. The states seeking reconsideration argue that: (1) the interpretation of the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), relied on in the July 7, 1999 Memorandum Opinion, conflicts with the Supreme Court's

[1] The states moving for reconsideration are Alaska, Arkansas, Connecticut, Florida, Kentucky, Louisiana, Maine, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Vermont and West Virginia. The remaining Plaintiff states support this motion.

subsequent ruling in *California v. ARC America Corp.*, 490 U.S. 93 (1989); (2) the Court mistakenly dismissed various state claims for equitable monetary relief in light of the Court's ruling on Idaho's claims under the Idaho Consumer Protection Act (ICPA); and (3) the Court mistakenly dismissed various state damages claims on behalf of both direct and indirect purchasers. The Court will address these arguments generally, and then apply that discussion to the individual state statutes.

II. DISCUSSION

A. Standard of Review

Under Federal Rule of Civil Procedure 54(b), a party may seek to revise an order or other form of decision "at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of all of the parties." Fed. R. Civ. P, 54(b). "Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly." *Continental Casualty Co. v. Diversified Indus., Inc.*, 884 F. Supp. 937, 943 (E.D. Pa.1995). Nevertheless, "[i]t is clear . . . that there are circumstances when a motion to reconsider may perform a valuable function." *Above the Belt v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983). In such circumstances, a Rule 54(b) motion can operate as the proper mechanism "for correcting errors and preventing injustice." *United States ex rel. Houck v. Folding Carton Admin. Committee*, 121 F.R.D. 69, 70 (N.D. Ill. 1988).

B. Substantive Arguments

1. Illinois Brick and *ARC America*

The plaintiff state seeking reconsideration argue that this Court adopted an overly expansive interpretation of the Supreme Court's decision in *Illinois Brick*. The states argue that this Court held that *Illinois Brick* in effect preempted state laws addressing the rights of indirect purchasers, in violation of the principles set forth by the Supreme Court in *California v. ARC America Corp.*

The states' argument is based on a misunderstanding of both *ARC America* and this Court's Memorandum Opinion. *ARC America* addressed the preemptive effect of *Illinois Brick*'s decision to deny standing to indirect purchasers under the Clayton Act. The issue was whether those states that had passed statutes expressly granting standing to indirect purchasers (so-called "*Illinois Brick* repealer statutes") could enforce those statutes in light of the federal adoption of the indirect purchaser doctrine. *See ARC America*, 490 U.S. at 100. The Supreme Court held that they could, as the decision in *Illinois Brick* was not intended to have a preemptive effect on the state's ability to craft and enforce their own antitrust laws. *Id.* at 105-06.

Contrary to plaintiff's argument, the *ARC America* Court did not hold that state courts were forbidden from relying on *Illinois Brick* as persuasive authority for how a state should interpret its antitrust regime. As noted by the Florida Court of Appeals:

> [*ARC America*] is not to say that the concerns raised in *Hanover Shoe* and *Illinois Brick* – the difficulties of tracing overcharges through a distribution chain, the possibility of multiple liability for defendants, and the prospects of inconsistent or duplicate federal and state judgments – are not valid policy considerations under state antitrust or deceptive trade practice statutes. *ARC America* simply declines to impose on each state the federal legislative antitrust policy of deterring violations by simplifying antitrust litigation.

Mack v. Bristol-Squibb, 673 So.2d 100, 107-08 (Fla. 1st Dist. Ct. App. 1996) *review dism'd*, 689 So.2d 1068 (Fla. Jan. 31, 1997). Indeed, a number of courts have looked to *Illinois Brick* to determine the scope and structure of state antitrust laws. *See, e.g., Boos v. Abbott Labs.*, 925 F. Supp. 49 (D. Mass. 1996); *Stifflear v. Bristol-Myers Squibb Co.*, 931 P.2d 471 (Colo. Ct. App. 1996); *Abbott Labs v. Segura*, 907 S.W.2d 503 (Tex. 1995). The fact that this Court similarly sought guidance from *Illinois Brick*'s discussion of antitrust policy does not conflict with the Supreme Court's ruling in *ARC America*. Thus, insofar as the states have asserted that this Court's interpretation of *Illinois Brick* was improper, their motion is denied.

2. State Restitution Claims

A number of states ask this Court to reconsider its rulings disallowing state restitution claims. This Court dismissed a number of state restitution claims on the basis that the law of those states prompts courts to look to federal law in interpreting their unfair competition and consumer protection statutes, and the Clayton Act does not authorize restitution. *See FTC v. Mylan Laboratories*, 62 F. Supp.2d 25, 41 (D.D.C. 1998). The Court allowed Idaho's claim under the Idaho Consumer Protection Act

(ICPA) to stand, however, on the basis that Idaho law prompts courts to consider decisions interpreting § 5(a)(1) of the FTC Act, rather than the Clayton Act. *See* Idaho Code § 48-604(a). As this Court had already held that the FTC could pursue equitable remedies such as disgorgement, the Court reasoned that Idaho should be permitted to pursue similar kinds of equitable relief under the ICPA.[2] Alaska, Connecticut, Florida, South Carolina, Vermont and West Virginia have asked this Court to reconsider its rulings under the laws of those states in light of the fact that they too prompt courts to consider the FTC Act when interpreting the state statutes. Other states have moved for reconsideration on the ground that, although their state statutes do not explicitly reference the FTC Act, the structure and purpose of the state statutes suggest that they should be interpreted in a similar manner.

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[2] It should be noted that no court, including this one, has held that the FTC may pursue restitution claims on behalf of indirect purchasers. Although this Court did authorize the FTC to seek disgorgement under § 13(b) of the Act, *see* Mem. Op. at 12-13, and at least one other court has permitted the FTC to pursue restitution, *see FTC v. Security Rare Coin*, 931 F.2d 1312 (8th Cir. 1991), no court has addressed the specific issue of restitution on behalf of indirect purchasers. The only guidance in this area, then, are the principles for interpreting the remedial powers of a district court set forth in the *Porter v. Warner* line of cases. *See Porter*, 328 U.S. 395 (1946); *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960); *see also* Mem. Op. at 11-12. In light of the expansive view of a court's equitable jurisdiction espoused in the *Porter* cases, the Court will assume that the FTC does have the authority to seek such relief.

The states are correct that there is an internal inconsistency between the Court's ruling on Idaho law and its rulings in respect [sic] Alaska, Connecticut, Florida, South Carolina and Vermont. The Court also finds that this inconsistency extends to other states whose statutes, though not explicitly referencing the FTC Act, permit the state to proceed in equity. Thus, the Court will reassess its rulings in respect to state statutes that explicitly reference, or are modeled after, the FTC Act, or that otherwise permit the state to pursue equitable remedies.

* * *

Louisiana

Louisiana moves this Court to reconsider the dismissal of its claims under the Louisiana Monopolies Act, La. Rev. Stat. Ann §§ 51:121 *et seq*. The July 7, 1999 Order in this case contained a scrivener's error dismissing Louisiana's claim for damages on behalf of direct purchasers under the Monopolies Act. That claim is reinstated.

Upon the benefit of further briefing, the Court will also reinstate Louisiana's claims for equitable monetary relief under La. Rev. Stat. Ann § 51:128. That section authorizes Louisiana, through its Attorney General, to sue for violations of the the [sic] Monopolies Act. *See State v. Classic Soft Trim, Inc.*, 663 So.2d 835, 835 (La. App. 5th Cir. 1995). Section 128 does not limit the state's ability to pursue the full range of equitable relief. The Court will therefore grant Louisiana's motion and permit the state to pursue claims for restitution on behalf of both direct and indirect purchasers.

The Court will not reinstate Louisiana's claim for damages as an indirect purchaser, or on behalf of indirect purchasers, under § 137 of the Monopolies Act. Section 137 grants standing to "any person" who suffers an antitrust injury. *See* La. Rev. Stat. Ann § 51:137. In *Free v. Abbott Laboratories*, 176 F.3d 298, 299 (5th Cir. 1999), the Fifth Circuit looked to the policy considerations underlying *Illinois Brick* and found that indirect purchasers do not have standing under § 137. Although Louisiana urges this Court to disregard the Fifth Circuit's conclusion, this Court will not ignore the holding of a federal appellate court in a case directly on point. The Court will therefore deny Louisiana's motion to reconsider its ruling on indirect purchaser standing under § 137.

Louisiana also moves this Court to reconsider its rulings under the state's Unfair Trade and Consumer Protection Act. Louisiana's claims for restitution on behalf of direct and indirect purchasers are reinstated, pursuant to La. Rev. Stat. Ann §§ 51:1407-1408, and the decision in *Classic*, 663 So.2d at 835. Louisiana's claim for damages on behalf of direct purchasers under the Act will also be reinstated, as the Louisiana Attorney General has *parens patriae* authority to bring antitrust actions on behalf of state citizens. *See State v. Bordens*, 684 So.2d 1024, 1026 (La. App. 4th Cir. 1996). The state's claim for damages on behalf of indirect purchasers under the Act will not be reinstated, however, as to do so would provide an end run around the Fifth Circuit's decision in *Free*. As stated by the Fifth Circuit in a similar context, a court should not interpret a state's antitrust laws "in a manner that rewards creative pleading at the expense of consistent application of legal principles." *Segura*, 907

S.W.2d at 506. Thus, Louisiana's motion to reinstate its damages claim on behalf of indirect purchasers under the Unfair Trade and Consumer Protection Act will be denied.

* * *

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No. 99-391

Supreme Court, U.S.
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In the Supreme Court of the United States

ROBIN FREE and RENEE FREE
Petitioners,

v.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB COMPANY and MEAD-JOHNSON & COMPANY
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CHEMICAL MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CHEMICAL MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations. The Chamber represents an underlying membership of more than three million businesses and professional organizations of every size, sector and geographic region of the country. The Chamber serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business.

The Chemical Manufacturers Association ("CMA") is a non-profit trade association whose member companies produce, market, and use industrial chemicals. CMA's members comprise more than 90% of the productive capacity for basic industrial chemicals in the United States.

Amici's members have been subjected to abusive class actions in state courts on a regular basis. They accordingly have a strong interest in supporting Congress's decision to confer federal jurisdiction over the claims of absent class members when the named plaintiffs satisfy the amount in controversy and diversity requirements of 28 U.S.C. § 1332.[1]

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[1] Pursuant to Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici, their members, or their counsel made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of the Court.

SUMMARY OF THE ARGUMENT

Section 1367 unambiguously authorizes the federal courts to exercise supplemental jurisdiction over the claims of absent class members, so long as the courts have original jurisdiction over the claims of the named plaintiffs. The only way for petitioners to escape from the plain language of the statute is to claim that Congress could not possibly have meant what it said. But that claim is hollow. Given the markedly unfair treatment that out-of-state defendants often suffer at the hands of state courts, and the dramatic stakes of modern-day class actions, it was perfectly rational for Congress to broaden federal jurisdiction over class actions by eliminating the requirement that absent class members satisfy the amount in controversy threshold contained in 28 U.S.C. § 1332.

ARGUMENT

As the Fifth and Seventh Circuits have held, and as respondents persuasively show in their brief, 28 U.S.C. § 1367 unambiguously authorizes federal courts to exercise supplemental jurisdiction over the claims of absent class members so long as the courts have original jurisdiction over the claims of the named plaintiffs. In the diversity context, this means that, if the named plaintiffs do not hail from the same state as any of the defendants and if the value of the claims of the named plaintiffs exceeds the monetary threshold established in 28 U.S.C. § 1332, the federal courts have jurisdiction over the claims of the absent class members without regard to the value of those claims. Because respondents' brief demonstrates the statute's crystal clarity and clears away the fog created by petitioners' brief, amici will not here burden the Court with an additional analysis of the plain language of the statute. Instead, we will demonstrate that broadening federal jurisdiction over class actions was a perfectly rational thing for Congress to do and hence debunk petitioners' suggestion that Congress could not have meant to have done it.

1. The original purpose of diversity jurisdiction was to protect out-of-state parties from being treated unfairly by local courts. See *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.). With the advent of the class action, the need for such protection has multiplied. As Judge Easterbrook recently explained:

> [A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.

Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999). The Fifth Circuit has similarly noted:

> [C]ertification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards.
>
> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citations and footnote omitted). Accord *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, C.J.) (explaining that, once cases are certified as class actions, defendants confront "intense pressure to settle" rather than "roll the[] dice" on a trial and risk

bankruptcy). See also HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973) (terming phenomenon "blackmail settlements").

2. The federal courts have recognized that, in order to prevent the class action device from being used as a weapon of extortion, it is necessary to apply the requirements of Rule 23 rigorously. See, *e.g.*, *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998); *Castano*, 84 F.3d at 740. In particular, the federal appellate courts have uniformly refused to permit class actions when the claims of the class members would require individualized proof and the defendant would have individualized defenses to those claims. See, *e.g.*, *Broussard*, 155 F.3d at 340-344; *Sprague v. General Motors Corp.*, 133 F.3d 388, 397-399 (6th Cir.) (en banc), cert. denied, 118 S. Ct. 2312 (1998); *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014, 1023-1025 (11th Cir. 1996); *Castano*, 84 F.3d at 744-745; *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626-630 (3d Cir. 1996), aff'd sub nom. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1084-1085 (6th Cir. 1996); *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 854-856 (9th Cir. 1982); *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974); *Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882-883 (5th Cir. 1973).[2] Indeed, several federal courts have recognized that

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[2] The federal district court decisions refusing to certify classes on this ground are too numerous to list. A representative sample includes: *Carpenter v. BMW of N. Am., Inc.*, 1999 WL 415390, at *3-*4 (E.D. Pa. June 21, 1999); *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 676-680 (S.D. Cal. 1999); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 220-222 (W.D. Mich. 1998); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 455-457 (D.N.J. 1998); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 220-222 (E.D. La. 1998); *Marascalco v. International Computer-*

it would violate the defendant's due process rights to try a case on the basis of class-wide proof when claims and defenses are individualized. See, *e.g.*, *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990); *Western Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976); *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 487-89 & n.21 (E.D. Pa. 1997); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 425 (E.D. La. 1997); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 372 (D.N.J. 1987), mandamus granted on other issues, 855 F.2d 1062 (3d Cir. 1988). See also *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 311-321 (5th Cir. 1998) (holding that Seventh Amendment precluded use of trial plan under which liability and damages for a large group of plaintiffs were extrapolated from findings for a sample group of 160 plaintiffs, and suggesting that due process would require same conclusion).

The federal courts also have refused to paper over differences in the laws of the various states simply to make a case manageable as a multi-state class action. See, *e.g.*, *Andrews*, 95 F.3d at 1024, 1025; *Castano*, 84 F.3d at 749-750; *Georgine*, 83 F.3d at 627; *American Med. Sys.*, 75 F.3d at 1085; *Rhone-Poulenc*, 51 F.3d at 1300-1302; *Carpenter*, 1999 WL 415390, at *2-*3; *Schwartz*, 183 F.R.D. at 677-678; *Jackson Nat'l Life*, 183 F.R.D. at 223; *Chin*, 182 F.R.D. at 457-462; *Ford Motor Co. Vehicle Paint*, 182

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ized Orkeratology Soc'y, Inc., 181 F.R.D. 331, 338-339, 340 (N.D. Miss. 1998); *Poe v. Sears, Roebuck & Co.*, 1998 WL 113561, at *2 (N.D. Ga. Feb. 13, 1998); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 424-425 (E.D. La. 1997); *Mack v. General Motors Acceptance Corp.*, 169 F.R.D. 671, 676-680 (M.D. Ala. 1996); *Kelley v. Mid-America Racing Stables, Inc.*, 139 F.R.D. 405, 410-411 (W.D. Okla. 1990); *Casper v. Cunard Line, Ltd.*, 560 F. Supp. 240, 243 (E.D. Pa. 1983); *McHan v. Grandbouche*, 99 F.R.D. 260, 266-267 (D. Kan. 1983).

F.R.D. at 222-224; *Marascalco,* 181 F.R.D. at 337-340; *Poe,* 1998 WL 113561, at *2-*4; *Masonite Corp. Hardboard Siding,* 170 F.R.D. at 421-424; *Mack,* 169 F.R.D. at 677-679; *Zandman v. Joseph,* 102 F.R.D. 924, 929-930 (N.D. Ind. 1984); *Casper,* 560 F. Supp. at 243-244; *McHan,* 99 F.R.D. at 267; *Elster v. Alexander,* 76 F.R.D. 440, 442 (N.D. Ga. 1977).

3. Regrettably, the state courts, as a group, have been far more lax in protecting defendants — particularly out-of-state defendants — from extortionate class actions.[3] As one Member of Congress recently testified at a House hearing:

> By any objective measure, state class action suits are increasingly the weapon of choice for some in the plaintiff's bar. * * *
>
> Opportunistic lawyers have identified those states and particular judges where the class action device can be exploited. The most significant of these devices is the certification of the class itself. For many companies, it is easier and less costly to settle a class action suit once it has been certified than to fight it in a foreign jurisdiction before a potentially unfriendly judge and jury. Some state courts, however, do not give the defendants a fighting chance. They routinely certify classes before the defendant has been served with a complaint and given an opportunity to defend itself. In one case, a state court judge certified the class before the case was even filed in the court.

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[3] We are not suggesting that every state court (or even the majority) has acquiesced in class action abuse, but simply that such abuse occurs with sufficient regularity in the state court system to make it rational for Congress to have expanded federal jurisdiction over class actions.

Hearings on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm., 105th Cong. (Mar. 5, 1998), http://www.house.gov/judiciary/41155.htm (statement of Representative James P. Moran) (hereinafter "Moran Testimony").

The more sophisticated members of the plaintiffs' class action bar have managed to identify specific counties within particular states in which they can be virtually assured of finding a judge who will certify a case as a class action without regard to whether it can fairly be tried as one. As the Wall Street Journal has reported:

> Plaintiffs' lawyers are going out of their way to sue big companies these days. All the way to backwaters like Plaquemine, La., Union City, Tenn., and Eutaw, Ala. A growing number of big lawsuits are landing in small towns. * * *
>
> Rural courts offer lawyers a strategic advantage. In major metropolitan areas, judges are assigned to cases by lottery, but small communities often have only one or two judges in town. * * * Unlike federal judges, many state judges are popularly elected, raising the possibility of bias.

Richard Schmitt, *Justice RFD: Big Suits Land in Rural Courts,* WALL ST. J., Oct. 10, 1996, at B1.

A few states have become particularly notorious for allowing extortionate class actions and running roughshod over the constitutional rights of out-of-state defendants and absent class members alike. For example, one study found that in 1995-1997 courts in six thinly populated rural Alabama counties certified 43 class actions, at least 28 of which were brought on behalf of nationwide classes, primarily against large national companies. Stateside Associates, *Class Action Lawsuits in State Courts: A Case Study in Alabama* (1998) (attached to Statement of Dr. John B. Hendricks

before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary (Mar. 5, 1998), available at 1998 WL 122544).[4] Another study found that the number of class actions filed in Texas state courts rose by 820% between 1988 and 1998. See *Class Action Litigation–A Federalist Society Survey*, 1 CLASS ACTION WATCH, at Figure 1.[5] That rate of increase is significantly higher than in the federal courts, where the number of pending class actions increased during the same ten-year period by 338%. *Ibid.*

These hand-picked state courts have demonstrated a propensity to certify classes that federal courts have refused to certify and to casually dispense with the procedural safeguards required by the Constitution and faithfully applied in the federal courts. For example, in 1996 a judge in Mobile County, Alabama, certified a nationwide class action alleging state law products liability, breach of warranty, negligence, and fraud claims on behalf of several million owners of homes on which the defendants' siding had been installed. In an opinion written by class counsel, the court brushed aside the constitutional choice-of-law problem, stating, without the slightest legal analysis, that "the Court is not persuaded that the variations in applicable state laws are so significant as to create predominant individual issues." Order Certifying Plaintiff Class at 8, *Naef v. Masonite Corp.*, No. CV-94-4033 (Mobile County Cir. Ct. Nov. 15, 1995) (reprinted in *Ex parte Masonite Corp.*, 681 So. 2d 1068, 1090 (Ala. 1996)). The court also gave short shrift to the contention that the claims were fact-specific and that the defendants were being denied the opportunity to prove defenses specific to the individual class members. *Ibid.* After the Alabama

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[4] Dr. Hendricks is the founder of an Alabama research and development company who appeared on behalf of the Chamber.

[5] A copy of this study has been lodged with the Clerk of the Court and served on the parties.

Supreme Court denied mandamus, the trial court held a "first-phase" trial limited to the issue of whether the defendants' products were defective. In that trial, the court purported to solve the dilemma of having to apply the laws of the 51 jurisdictions by simply making up its own law, amalgamating bits and pieces of the laws of the 51 jurisdictions into five different design defect standards that did not accurately represent the law of *any* State.

Meanwhile, another set of class action lawyers sought certification of an identical class in federal court. That court denied certification, holding that "[d]ifferences in state law and user facts overwhelm the common elements of plaintiffs' claims. Combined, these differences are so great as to make national class treatment unwieldy, unfair, and unlawful." *Masonite Corp. Hardboard Siding*, 170 F.R.D. at 425. The court further explained that the experience with the first phase of the Alabama case "supplies ample evidence of legal and factual variation, and thus counsels against manageability and superiority." *Id.* at 426 n.19. It deemed inadequate the Alabama court's attempt to boil down the laws of 51 jurisdictions into five sets of "Esperanto instruction[s]," opining that "[t]he number of state products liability laws that confront Masonite and their doctrinal dissonance cannot be glossed over casually." *Id.* at 422. The court concluded that "Due Process, the Seventh Amendment, * * * and Rule 23 make it impossible to accommodate the theoretical benefits of class treatment." *Id.* at 427. The defendants in *Naef* brought the Louisiana district court's ruling to the attention of the Alabama courts before what was to be the second phase of the class action trial, but the trial court refused to decertify the class, and the Alabama Supreme Court denied mandamus.[6]

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[6] For a fuller description of the constitutionally flawed procedures imposed in *Naef*, see Application for a Stay of Proceedings Pending the Filing of a Petition for a Writ of Certiorari to Review a Final

Similarly, in 1996 a federal district court in Alabama refused to certify a class action alleging that a subsidiary of General Motors fraudulently failed to disclose that it purchases installment contracts at a lower interest rate than the one charged to the car purchaser by the dealer. *Mack v. General Motors Acceptance Corp.*, 169 F.R.D. 671 (M.D. Ala. 1996). Reasoning that the jury would have to examine the circumstances of each transaction to resolve such issues as duty to disclose and reliance, the court dubbed the case "the antithesis of a class action." *Id.* at 677-678. Yet an Alabama trial court certified a class action raising the identical claims against a Ford subsidiary, and the Alabama Supreme Court refused to intervene. See *Ex parte Ford Motor Credit Co.*, 697 So. 2d 464 (Ala. 1997) (Hooper, C.J., dissenting).

Texas is another state in whose courts out-of-state defendants have regularly been subjected to extortionate class actions. For example, in *Texas Farmers Insurance Co. v. Sendejo*, No. 95-08-09165-CV (365th Jud. Dist. Ct.), the plaintiffs alleged that Allstate and Texas Farmers Insurance Company improperly engaged in "double-rounding" of the premiums for their auto insurance. This method of computation, *which had been required by the Texas Department of Insurance*, allegedly resulted in the overcharging of policyholders by perhaps a dollar or two per year. The suit arose when a former general counsel of the Department of Insurance with knowledge of the practice approached a Dallas lawyer well known for winning huge settlements on questionable theories of recovery. The lawyers recruited three named

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Decision of the Supreme Court of Alabama, *International Paper Co. v. Naef*, No. A-28 (filed July 3, 1997). During the pendency of the stay application, the defendants — in what could hardly be described as a surprising move in view of the forum and the amount of compensatory and punitive damages claimed by the class — settled the case and withdrew the stay application.

plaintiffs and filed a putative class action (on behalf of all Texas holders of Allstate and Farmers' policies) in rural Zavala County, a jurisdiction with very few of the putative class members but a reputation for being solicitous of plaintiffs' lawyers. See Max Boot, *Rule of Law: A Texas-Sized Class Action Fraud*, WALL ST. J., May 22, 1996, at A23. They then hired a former high school classmate of the presiding judge to act as co-counsel, and, after consistently obtaining favorable rulings from the district court, coerced the defendants into settling the dispute. The settlement agreement provided for refunds of some $5.50 per policyholder and roughly $10 million in attorneys' fees, with the bill footed, ultimately, by defendants' policyholders. As commentators uniformly declared, only the lawyers were winners. See, *e.g.*, *Auto Insurance: Class-Action Settlement Was a Travesty*, DALLAS MORNING NEWS, Dec. 26, 1996, at 28A; *Review & Outlook: Taken for a Ride*, WALL ST. J., Oct. 23, 1996, at A22.

Equally disturbing is *Ford Motor Co. v. Sheldon*, 965 S.W.2d 65 (Tex. App.–Austin), review granted Dec. 23, 1998. In *Sheldon*, the district court certified two classes of purchasers of Ford automobiles with respect to claims arising out of Ford's use of an allegedly defective paint process, and the Court of Appeals affirmed. *See id.* at 74. But in an identical suit, purportedly brought on behalf of a nationwide class of Ford owners, the United States District Court for the Eastern District of Louisiana concluded, after a searching review, that both (1) individual factual issues predominated over common issues, and (2) the proposed class action would not be superior to individual trials in the resolution of the class members' claims. See *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214 (E.D. La. 1998). Although most, if not all, of the federal court's analysis applied with equal force to the statewide class claims in *Sheldon*, the state court nonetheless certified a class, and the court of appeals affirmed.

The Texas courts also have certified nationwide classes of plaintiffs alleging fraud in the sale of so-called vanishing premium life insurance policies, overlooking the constitutional requirement that they apply the law of the various states in which the policies were issued and paying no heed to the individualized nature of the class members' claims. See, *e.g., Security Life of Denver Ins. Co. v. Ferguson,* 1999 WL 339017 (Tex. App.–Dallas May 28, 1999); Order Certifying Class, *Klinefelter Family Revocable Living Trust v. First Life Assurance Co.,* No. C-6930-96-G (Hidalgo County Dist. Ct. Mar. 30, 1999).[7] In contrast, the federal courts routinely have held that the need to apply the laws of multiple states, individualized issues of reliance, and differences in the representations made to each policyholder make such cases impossible to try as class actions. See, *e.g., Kent v. SunAmerica Life Ins. Co.,* 2000 WL 15015 (D. Mass. Jan. 3, 2000); *Parkhill v. Minnesota Mut. Life Ins. Co.,* 188 F.R.D. 332 (D. Minn. 1999); *Velasquez v. Crown Life Ins. Co.,* 1999 U.S. Dist. LEXIS 13186 (S.D. Tex. Aug. 10, 1999); *In re: The Hartford Sales Practices Litig.,* 1999 U.S. Dist. LEXIS 10402, at *40-*51 (D. Minn. June 10, 1999); *In re Jackson Nat'l Life Ins. Premium Litig.,* 183 F.R.D. 217 (W.D. Mich. 1998); *Peoples v. American Fidelity Life Ins. Co.,* 176 F.R.D. 637 (N.D. Fla. 1998).

Similar mistreatment of out-of-state companies has occurred in North Dakota. A trial court in that state certified a class of approximately 6,000 owners of royalty interests and leasehold interests in wells from which the defendant out-of-state oil company purchased oil over a 19-year period. The plaintiffs' claim is that, when measuring the amount of oil taken from storage tanks by "hand gauging," the defendant's gaugers made adjustments to various readings that had the effect of understating the amount of oil taken. Despite the

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[7] A copy of this order has been lodged with the Clerk of the Court and served on the parties.

fact that there were thousands of different tanks involved, each with its own characteristics, that the defendant utilized numerous gaugers over the years, and that, many of the measurements were witnessed and approved by employees of the oil producers, the trial court certified a non-opt-out class action. Although concluding that two of the trial court's findings justifying a non-opt-out class action were legally erroneous, the North Dakota Supreme Court affirmed a third finding justifying non-opt-out treatment as well as the trial court's critical findings that common issues predominate over individual issues, that a class action is the most appropriate means of adjudicating the claims, and that management of the case as a class action would not pose unusual difficulties. *Ritter, Laber & Assocs. v. Koch Oil, Inc.,* 2000 N.D. LEXIS 14 (N.D. Jan. 21, 2000). Yet with individualized issues as to whether an adjustment was made at all and whether any adjustment was warranted by the condition of either the particular tank or the oil or both and with individualized defenses such as whether the producer consented to an adjustment, it is manifest that the only way this case can be tried as a class action is by depriving the defendant of its due process rights.

And, as a result of one Illinois court's willingness to certify and try a 4.7-million member, 48-state class action against State Farm under Illinois law — despite the refusals of two federal courts and one state court from northern Illinois to certify similar (indeed smaller) classes[8] — southern

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[8] See *Moorhead v. State Farm Mut. Auto. Ins. Co.,* No. 95-AR-0668-S (N.D. Ala. Sept. 12, 1997); *Murray v. State Farm Mut. Auto. Ins. Co.,* No. 96-2585-M1/A (W.D. Tenn. Aug. 19, 1997); *Rios v. Allstate Ins. Co.,* No. 94 CH 11396 (Cook County Cir. Ct. Jan. 27, 1998).

Illinois has recently been added to the list of favorite venues for class action lawyers.[9]

A consortium of plaintiffs' lawyers from around the country filed the class action in sparsely populated Williamson County, Illinois, on July 28, 1997, alleging that State Farm breached its contracts with its policyholders (which generally required State Farm to pay the amount necessary to restore damaged vehicles to pre-loss condition) and violated Illinois' consumer fraud statute by using the price of parts made by companies other than the automakers or their licensees ("non-OEM parts") when determining how much to pay for repairs to its policyholders' vehicles. The trial court certified the class on the same day without waiting for State Farm to be served, much less file an opposition to class certification. The court eventually held a hearing and reconfirmed its ruling, notwithstanding State Farm's argument that the need to apply the laws of the 48 states represented in the class and the individualized factual determinations that would be required made it impossible to try the case as a class action consistent with due process.[10]

The 4.7 million class members had myriad makes and models of automobiles, and over 30,000 different non-OEM parts were specified in the 4.7 million repair estimates. Undaunted, the court proceeded to conduct a trial, in which the plaintiffs were allowed to prove their claim using anecdotal testimony by owners of body shops and some

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[9] To be sure, State Farm is an Illinois company and hence would not have been able to remove the suit. Our point in discussing it is simply to illustrate the kinds of abuses that go on in some state courts and that make the expansion of federal jurisdiction over class actions perfectly rational.

[10] For a more complete description of the class certification phase of the case, see Petition for Writ of Certiorari, No. 97-2063, *State Farm Mut. Auto. Ins. Co. v. Speroni* (filed June 22, 1998).

internal State Farm memos criticizing particular non-OEM parts. They were not required to prove that each class member actually received one or more non-OEM parts (as opposed to simply having one specified on a repair estimate),[11] that the particular non-OEM parts used in each class member's repair (if any) were inferior to their OEM counterparts, or that the particular non-OEM parts installed in class members' vehicles failed to restore *any* (much less every) class member's vehicle to its pre-loss condition. Meanwhile, the trial court precluded State Farm from attempting to present individualized defenses, such as waiver and estoppel.[12] The court also prohibited State Farm from adducing testimony from current and former insurance regulators that the use of non-OEM parts was encouraged and/or permitted in their states.

Having simply been instructed to determine whether State Farm breached its "contract with the class" by using non-OEM parts, the jury found that it did. It awarded the class $456,636,180 in compensatory damages, despite the admissions of the plaintiffs' damages expert that one component of his damages calculation made no economic sense and that, in estimating the other component, he had ignored various real-world factors that could not be determined on a class-wide

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[11] State Farm adduced evidence at trial that, for a variety of reasons, class members often received OEM parts at no extra expense despite the fact that State Farm had specified a non-OEM part on the repair estimate.

[12] Many of the class members resided in states whose laws expressly require insurers to obtain the consent of the insured as a condition of using non-OEM parts. See, *e.g.*, Colo. Rev. Stat. Ann. § 42-9-107; Ind. Code § 27-4-1.5-8; N.Y. Comp. Codes R. & Regs. tit. 11, § 216.7(b)(5)(ii); Or. Rev. Stat. §§ 746.287(1), 746.292(4)(b); R.I. Gen. Laws 1956 § 27-10.2-2; W. Va. Code § 46A-6B-3.

basis. The trial court then piled on an additional $130,000,000 in so-called "disgorgement" damages and $600,000,000 in punitive damages under the Illinois Consumer Fraud and Deceptive Business Practices Act.

Unsurprisingly, both the initial class certification and the eventual enormous judgment have been chum in the water for class action lawyers. An extraordinary number of class actions were brought in two southern Illinois counties in the months following the trial court's reaffirmation of the class certification order, many purporting to be on behalf of multi-state classes and most targeted against out-of-state defendants.[13] The October 1999 verdict produced an even more dramatic response. In the last three months of 1999, at least ten consumer class actions were filed in the same two counties, most of them against out-of-state businesses and on behalf of putative nationwide classes.[14]

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[13] See, *e.g.*, *Vollmer v. Publishers Clearing House*, No. 98-L-100B (St. Clair County, filed Feb. 3, 1998); *Longstreet v. State Farm Mut. Auto. Ins. Co.*, No. 98-MR77 (Madison County, filed Feb. 27, 1998); *Crockett v. Michigan Bulb Co.*, No. 98-L-1054 (St. Clair County, filed Dec. 11, 1998); *Crockett v. Seta Corp.*, No. 98-L-1055 (St. Clair County, filed Dec. 11, 1998); *Crockett v. Time, Inc.*, No. 98-L-1056B (St. Clair County, filed Dec. 11, 1998); *Crockett v. United States Purchasing Exch.*, No. 98-L-1057 (St. Clair County, filed Dec. 11, 1998); *Coco v. State Farm Mut. Auto. Ins. Co.*, No. 99-L-394A (St. Clair County, filed April 28, 1999); *Turner v. Vistakon, Inc.*, No. 99-L-669 (Madison County, filed June 6, 1999); *Reichmann v. Archer Daniels Midland Co.*, No. 99-L-800 (Madison County, filed Aug. 6, 1999); *Nagel v. Archer Daniels Midland Co.*, No. 99-L-801 (Madison County, filed Aug. 6, 1999); *Littleton v. Shelter Ins. Co.*, 99-L-864 (Madison County, filed Sept. 7, 1999); *Shemwell v. The Farmers Ins. Group of Cos.*, No. 99-L-865 (Madison County, filed Sept. 11, 1999).

[14] See *Paul v. Country Mut. Ins. Co.*, No. 99-L-995 (Madison County, filed Oct. 13, 1999); *Stone v. SBU, Inc.*, No. 99-L-977 (Madison County, filed Oct. 7, 1999); *Arnold v. State Farm Mut. Auto. Ins. Co.*, No. 99-L-0896 (St. Clair County, filed Oct. 22, 1999); *Strasen v. Allstate Ins. Co.*, No. 99-L-1040 (Madison County, filed Oct. 26, 1999); *Phillips v. Ford Motor Co.*, No. 99-L-1041 (Madison County, filed Oct. 26, 1999); *Hobbs v. State Farm Mut. Auto. Ins. Co.*, No. 99-L-1068 (Madison County, filed Nov. 2, 1999); *Rios v. St. Paul Fire & Marine Ins. Co.*, No. 99-L-1125 (Madison County, filed Nov. 16, 1999); *Capone v General Motors Corp.*, No. 99-L-1127 (Madison County, filed Nov. 17, 1999); *Siler v. State Farm Mut. Ins. Co.*, No. 99-L-863 (Madison County, filed Nov. 30, 1999); *Winn v. Associates First Capital Corp.*, No. 99-L-1227 (Madison County, filed Dec. 23, 1999).

4. In short, out-of-state class action defendants have been subjected to procedural unfairness in state courts that would not be tolerated by the federal courts. That trend has been accelerating in recent years. As Congressman Moran put it, "[i]n essence, we have a situation where out of state defendants are being haled into the plaintiffs' state court where they face complex litigation with large sums of money at stake. These are the types of cases for which diversity jurisdiction was created." Moran Testimony, *supra*.

The compelling interest in ensuring that the engines of the American economy are not subjected to class action extortion in state courts supplies a more than rational reason for Congress to have excluded Rule 23 from the exceptions to supplemental jurisdiction set forth in 28 U.S.C. § 1367(b). Because Section 1367 unambiguously provides for supplemental jurisdiction over the claims of absent class members when the claims of the named plaintiffs satisfy the requirements of 28 U.S.C. § 1332, and because there was a manifestly rational reason for doing so, petitioners' effort to have the Court read in an exception for class actions should be rejected.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ROBIN FREE AND RENEE FREE,
Petitioners,

v.

ABBOTT LABORATORIES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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IN THE

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ROBIN FREE AND RENEE FREE,
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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief is filed on behalf of the Product Liability Advisory Council as *amicus curiae* in support of respondents, with the written consent of the parties.[1]

[1] No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council ("PLAC") is a nonprofit corporation with over 100 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers in industries ranging from electronics to automobiles to pharmaceutical products. PLAC has filed numerous *amicus* briefs in federal and state court proceedings raising issues with significant consequences for products liability law. In particular, PLAC's members have a significant interest in the rules governing removal to federal court of putative class actions filed in state courts. PLAC's members have observed the marked increase in state-court class actions in recent years, and many have first-hand experience with the current practices in many state courts with respect to certification of classes. For these reasons, PLAC and its members have a significant interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

Petitioners Robin and Renee Free are the named plaintiffs in a lawsuit originally filed in Louisiana state court against the respondents, alleging violations of a state antitrust statute, on behalf of themselves and a class of additional unnamed plaintiffs. Petitioners are both residents of Louisiana. Respondents are all out-of-state corporations.

It is an open secret in the class action bar that that even though officially adopted class action standards are relatively uniform among federal and state courts, certain local state courts in some jurisdictions are significantly more likely to certify large-scale, multi-state class actions than are federal and other state courts. In recent years, a number of Louisiana state courts have fallen in that category. *See* Exec. Summary, RAND Institute for Civil Justice, *Class Action Dilemmas* 7 (1999). And, of course, Louisiana residents would prefer to litigate against large out-of-state corporations in their own state courts, rather than the courts of the nation. Like most class action defendants, respondents in this case therefore sought to remove this purported class action from the state court and to seek the security of a federal forum – and the federal rules of procedure – under the federal diversity jurisdiction statute, 28 U.S.C. § 1332.

1. Because the petitioners' claims satisfied both the citizenship and amount-in-controversy predicates for federal diversity jurisdiction, *see* 28 U.S.C. § 1332, the federal district court properly asserted original jurisdiction over their claims under the diversity statute. And under the plain terms of the supplemental jurisdiction statute, 28 U.S.C. § 1367, if the court has "original jurisdiction" over any claim in a civil action, the court has "supplemental jurisdiction" over "all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case and controversy under Article III of the United States Constitution," including "claims that involve the joinder or intervention of additional parties." 28 U.S.C. § 1367(a). There is no dispute here that the claims of the unnamed class members are sufficiently related to the claims of petitioners such they form part of the same case and controversy within the meaning of Article III; joinder of the unnamed plaintiffs claims under Rule 23 is therefore proper under the plain terms of § 1367(a).

Petitioners urge a different interpretation of § 1367. They argue that a federal court does not have "original jurisdiction" under § 1367 over a claim that satisfies the amount-in-controversy minimum if that claim is accompanied by claims that do *not* satisfy that minimum. For this reading of the requirements of "original jurisdiction," petitioners rely on this Court's opinion in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). But *Zahn* did *not* hold that a court lacks "original jurisdiction" over civil actions that include monetarily insufficient claims. *Zahn*, like its predecessor

cases, made perfectly clear that the court must dismiss any insufficient claims, but that the court maintains its original jurisdiction over the action and any sufficient claims that are asserted. Section 1367 simply alters the requirement that insufficient claims be dismissed: where *Zahn* implicitly rejected the argument that a court ought to assert ancillary jurisdiction over insufficient claims so long as it has original jurisdiction over any sufficient claims, § 1367 by statute confers such "ancillary" – now "supplemental" – jurisdiction over those same claims.

This plain textual reading is not inconsistent with the legislative history, as petitioners assert. Even assuming that legislative history can in some instances subvert a statute's clear language, this is not such a case. The history does not even come close to demonstrating that every member of Congress who voted for the statute that became § 1367 intended to preserve the *Zahn* rule; to the contrary, that history does not reveal even a single member of Congress who proclaimed a belief that § 1367 would preserve *Zahn*. In fact, the only clear statement in the legislative record about the fate of *Zahn* appears in a report that expressly urges overruling that case, and recommends language substantively identical to what became § 1367 to accomplish that result.

2. The statute is also hardly "absurd" as a matter of expected congressional policy. Far from it: the importance of providing a federal forum for state-law claims against out-of-state defendants – especially out-of-state corporations – cannot be oversold. While it cannot be said that every local court in every state fails to apply basic class action requirements appropriately, or is susceptible to biased treatment of foreign corporations, there is an obvious reason why radically disproportionate numbers of class actions are being filed in selected county courts in certain states. The evidence, and the consistent experience of *amicus* PLAC's members, demonstrates that certain state courts do not take

seriously the fundamental due process norms underlying the standard class action requirements of issue commonality and predominance. Section 1367 provides a sensible solution, eliminating the formalistic barrier to removal presented by the requirement that even the unnamed members in a class action allege an injury in excess of the diversity minimum, even where the claims of the entire class range in the millions of dollars.

ARGUMENT

This is a case of statutory interpretation. The question presented is whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, requires a court that has original jurisdiction over the claims of a named class action plaintiff that satisfy both the diverse citizenship and the amount-in-controversy predicates of the diversity jurisdiction statute, 28 U.S.C. § 1332, to assume supplemental jurisdiction over the related claims of unnamed class members joined with that plaintiff pursuant to Federal Rule of Civil Procedure 23. Although this Court in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), operating under the old nonstatutory rules of ancillary and pendent jurisdiction, had implicitly rejected joinder of monetarily insufficient claims as ancillary to sufficient claims, Congress obviously had the power to change that rule by statute. *See Finley v. United States*, 490 U.S. 545, 556 (1989). That is what Congress did. This reading of the statute is not "absurd" or inconsistent with the legislative history, as petitioners suggest. It is what the plain text requires. And there are very good reasons for giving out-of-state defendants faced with a massive overall potential class-action liability the opportunity to repair to a federal forum, even where the individual claims of unnamed class members could not be asserted on their own in a federal diversity action.

I. THE PLAIN LANGUAGE OF § 1367 CONFERS SUPPLEMENTAL FEDERAL JURISDICTION OVER THE CLAIMS OF UNNAMED CLASS MEMBERS

A

1. *Section 1367(a).* The answer to the question whether there is federal jurisdiction over the claims in petitioners' state-law class action begins with the first paragraph of the supplemental jurisdiction statute, 28 U.S.C. § 1367. That paragraph provides:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

It should be clear from this language, read in its entirety, that the phrase "a civil action" within the court's "original jurisdiction" does not refer to the overall action itself, but only to those individual claims within an action that are themselves within the court's original jurisdiction. So long as there is a *claim* that falls within a district court's "original jurisdiction," in other words, the court has supplemental jurisdiction over "all *other* claims" in the action that are transactionally related to that claim. 28 U.S.C. § 1367(a) (emphasis added). This Court's opinion in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), makes this point perfectly clear and, in doing so, sets forth the basic structure for applying § 1367(a).

In *City of Chicago*, a plaintiff had asserted in a complaint in state court a number of state-law claims for review of a state administrative agency action, as well as federal constitutional claims that state law allowed to be joined in a complaint for administrative review. *See id.* at 164. The defendant removed the action to federal court, and the plaintiffs objected, contending that because federal courts traditionally did not have "original jurisdiction" over the state-law administrative-review claims, the case could not be heard in federal court. *Id.* at 166. According to this Court, that argument was founded on a "an erroneous premise": the court's "original jurisdiction derives from [plaintiff's] federal claims, not its state law claims." *Id.* And once federal jurisdiction is established, "the relevant inquiry respecting the accompanying state claims is whether they fall within a district court's *supplemental* jurisdiction, *not* its original jurisdiction." *Id.* at 167. The notion proposed by the *City of Chicago* plaintiffs that a court must determine whether the state-law claims themselves fit within the court's "original jurisdiction," the Court explained,

> would effectively read the supplemental jurisdiction statute out of the books: The whole point of supplemental jurisdiction is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking.

Id.

For purposes of establishing supplemental jurisdiction over claims in a removed action, *City of Chicago* thus confirms that the first task is to determine whether there are any claims within the overall action over which the federal court has original jurisdiction. That is plainly so here. The district court has original jurisdiction over the claims of petitioners, the named plaintiffs in the state-law cause below: the citizenship of each petitioner is completely diverse from that of

each respondent, and each of petitioners' claims against the respondents exceeds the amount-in-controversy requirement of the diversity statute.

Having established original federal jurisdiction over the claims of the named plaintiffs in this action, the next task is simply to determine whether the accompanying claims – here, the monetarily insufficient claims of the unnamed class members – "fall within [the court's] supplemental jurisdiction." *City of Chicago*, 522 U.S. at 167. Under the terms of the statute, that inquiry turns on whether the unnamed plaintiffs' claims "are so related" to claims over which the court has original jurisdiction "that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a); *see City of Chicago*, 522 U.S. at 165, 167. This point is not contested by petitioners: the "nucleus of operative fact" common to every plaintiff's claim, *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966), is whether or not the respondents conspired to fix the prices of infant formula. And because supplemental jurisdiction as defined § 1367(a) expressly includes "claims that involves the joinder or intervention of additional parties," it is clear that joinder of the unnamed class members' claims under Rule 23 is proper.

2. *Section 1367(b).* Because the federal court's "original jurisdiction" is invoked in this case under the diversity statute, 28 U.S.C. § 1332, the supplemental jurisdiction statute requires one additional inquiry. Where the diversity statute is the source of the court's original jurisdiction under paragraph (a) of § 1367, paragraph (b) provides certain specific exceptions to the joinder of parties and claims otherwise authorized under paragraph (a):

> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

As petitioners observe, § 1367(b) "sets forth a number of limitations on the exercise of supplemental jurisdiction in a diversity action." Pet. Br. at 19. But while paragraph (b) expressly prohibits a court from taking supplemental jurisdiction over the claims of plaintiffs joined under Rule 19, or who seek to intervene under Rule 24, the paragraph does *not* speak to a court's supplemental jurisdiction over the claims of plaintiffs joined under Rule 23. Paragraph *(b)* of § 1367, in other words, simply has nothing to say about whether paragraph *(a)* of the statute authorizes a court that has original jurisdiction over the claims of named plaintiffs in a class action to assert supplemental jurisdiction over unnamed members joined pursuant to Rule 23. Indeed, the absence of a prohibition in paragraph (b) on the use of Rule 23 in that fashion – despite the list of other specified prohibitions – suggests that Congress actually contemplated that the rule *would* be used to join class claims under paragraph (a). *See TVA v. Hill*, 437 U.S. 153, 188 (1978); *National Passenger R.R. Corp. v. National Assoc. of R.R. Passengers*, 414 U.S. 453, 458 (1974).

B

Petitioners understandably do not, in fact, argue for the existence of an exception in § 1367(b) that simply is not there. The true focus of their alternative textual reading of

the statute is not on § 1367(b) at all, but, rather, on the phrase "original jurisdiction" in § 1367(a).

1. Relying upon this Court's opinion in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), and its forebears, *e.g.*, *Snyder v. Harris*, 394 U.S. 332 (1969); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 589 (1939), petitioners assert that it was a fundamental requirement of "original jurisdiction" predating § 1367 that "in a multi-plaintiff diversity action . . . the claims of each plaintiff must satisfy the jurisdictional minimum [amount-in-controversy]." Pet. Br. at 13. Because it was, as petitioners say, a "requirement of original jurisdiction that each and every plaintiff in the action has claims exceeding the jurisdictional minimum," *id.* at 16, a court may not assume "original jurisdiction" *ab initio* under § 1367(a) over a "civil action" that includes claims beneath the jurisdictional minimum.

The precise nature of petitioners' argument is not clear, but they could not plausibly be arguing that a court may not assert "supplemental jurisdiction" over a "civil action" if the court does not have "original jurisdiction" over any nonfederal claims within the overall action. That view, of course, would be directly contrary to the supplemental jurisdiction statute, "the whole point" of which "is to allow the district courts to exercise pendent jurisdiction over claims as to which original jurisdiction is lacking." *City of Chicago*, 522 U.S. at 167.

Properly understood, petitioners' argument instead seems to be that a court does not have "original jurisdiction" even over a claim that otherwise appears to meet the requirements of diversity jurisdiction, if that claim is accompanied by claims that do not meet those requirements. The presence of any claim that does not meet both requirements of diversity jurisdiction, petitioners imply, essentially "destroys" the court's "original" diversity jurisdiction over even those

claims in the action that do meet those requirements. Section 1367(a)'s requirement of "original jurisdiction," in other words, must be understood as prohibiting a court from taking jurisdiction over a diversity-based claim that is accompanied by claims that do not meet the requirements of diversity.

The problem for petitioners is that they are, at best, only half right about the jurisdictional effect in multi-plaintiff actions of the two requirements of diversity, and the requirement they get wrong is the one that governs this case. The requirement of complete citizenship diversity, *see Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), may well be the sort of "rule of original diversity jurisdiction" that "destroys" the jurisdiction of a court over even the claims of diverse parties to an action that also includes nondiverse parties, *cf. Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 388 (1998), but this Court has never held – or even suggested – that the minimum amount-in-controversy rule that is at issue in this case is the same kind of rule.

(a) Citing a series of cases leading up to and including *Zahn*, petitioners assert that the amount-in-controversy rule "was understood" in this Court's decisions "as a declaration by Congress that that the federal courts shall not have jurisdiction, based only on diversity, where the claims of any plaintiff in a multi-plaintiff diversity action do not meet the amount-in-controversy threshold." Pet. Br. at 15. But neither *Zahn* nor any of its antecedents *ever* said that a federal court lacks jurisdiction over a civil action in diversity case "where the claims of any plaintiff in a multi-plaintiff diversity action do not meet the amount-in-controversy threshold."

To the precise contrary, the rule enunciated and applied in *Zahn*, according to *Zahn* itself, held that "district courts *were to entertain* the claims of only those class action plaintiffs whose individual cases satisfied the jurisdictional

amount requirement." 414 U.S. at 297-98 (emphasis added). Thus,

> *Zahn* does not require that an entire class action be dismissed for lack of subject matter jurisdiction over some of the class members. Rather, the court is required only to dismiss only those class members whose claims appear to a "legal certainty" to be less than the jurisdictional amount.

In re School Asbestos Litig., 921 F.2d 1310, 1315 (3d Cir. 1990). The same was true of the earlier cases. *Snyder v. Harris*, 394 U.S. 32 (1969), for example, had already held "that class actions involving plaintiffs with separate and distinct claims were subject to the usual rule that a federal district court *can assume jurisdiction* only over those plaintiffs presenting claims exceeding the $10,000 minimum specified in § 1332." *Zahn*, 414 U.S. at 299 (describing *Snyder*; emphasis added). *See also Clark v. Paul Gray, Inc.*, 306 U.S. 583, 590 (1939). Contrary to petitioners' characterization of the amount-in-controversy rule as a sword that pierces the jurisdiction of the court over the entire action, that rule in fact required *only* the "dismissal of *those litigants whose claims do not satisfy the jurisdictional amount*, even though other litigants assert claims sufficient to invoke the jurisdiction of the federal court." *Zahn*, 414 U.S. at 295 (emphasis added); *see also* Thomas D. Rowe, Jr., *1367 and All That: Recodifying Federal Supplemental Jurisdiction*, 74 Ind. L.J. 53, 63 (1998) (under *Zahn*, "unnamed class members with jurisdictionally insufficient claims could not tag along in federal court; only unnamed class members with jurisdictionally sufficient claims could be part of the class").

It is therefore incorrect to argue, as petitioners do, that the amount-in-controversy rule prohibits a court from asserting its "original jurisdiction," within the meaning of § 1367(a), over a claim that satisfies the jurisdictional minimum amount, if that claim is accompanied by jurisdictionally insufficient claims. The amount-in-controversy rule is not, and never was, that kind of rule of original diversity jurisdiction.

(b) The case may be different when the diversity predicate in question is the requirement of completely diverse citizenship, first enunciated by this Court in *Strawbridge*. A recent opinion of this Court suggests that the rule of "complete diversity" *is* a rule of original diversity jurisdiction: "A case falls within the federal district court's 'original' diversity 'jurisdiction' only if diversity of citizenship among the parties is complete, *i.e.*, only if there is no plaintiff and no defendant who are citizens of the same State." *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 388 (1998). And "[w]here original jurisdiction rests upon Congress' statutory grant of 'diversity jurisdiction,' this Court has held that one claim against one nondiverse defendant destroys that original jurisdiction." *Id.* at 389.

The rule of complete diversity thus appears to have fundamentally different jurisdictional consequences in a multi-plaintiff action than the amount-in-controversy rule. With respect to the complete diversity rule, petitioners' view of "original jurisdiction" in § 1367 may well be right: a court may not be able to assert "original" *diversity* jurisdiction under the statute over the claim of a diverse plaintiff in a civil action that includes claims of other, nondiverse plaintiffs, because "[t]he presence of the nondiverse party automatically destroys *original* jurisdiction." *Id.* at 389. As explained above, however, that has never been true of the amount-in-controversy rule. To the contrary, *Zahn* and its antecedents explicitly state that the court *retains* its original jurisdiction over those claims that satisfy the statutory minimum. *See supra* at 11-12. It follows that nothing in the amount-in-controversy rule prohibits a court from asserting original jurisdiction over jurisdictionally sufficient claims

under § 1367, and then asserting supplemental jurisdiction over the insufficient claims in accordance with the plain terms of § 1367.

The Court's analysis in *Schacht* provides useful guidance for the instant case. *Schacht* involved a civil action initially filed in state court that included federal claims against state officers in their individual capacities, as well as claims that were, for purposes of the Eleventh Amendment, constructively against the state itself. *See* 524 U.S. at 383-84. Because the Eleventh Amendment would have barred the claims against the state from being brought in federal court, *id.* at 385, the question presented in *Schacht* was whether "the presence of even one such [barred] claim in an otherwise removable case deprived the federal courts of removal jurisdiction over the entire case." *Id.*

This Court held that removal of the action was not improper, because the presence of a claim barred by the Eleventh Amendment "does not automatically destroy original jurisdiction" over the entire action. *Id.* at 389. En route to that holding, the Court compared the presence of an Eleventh Amendment-barred claim in a federal question case with the presence of a nondiverse party in a diversity case, suggesting that in the latter situation, removal of the overall action is improper because the "presence of the nondiverse party automatically destroys original jurisdiction." *Id.* By contrast, the Court explained, because the Eleventh Amendment only provides a sovereign-immunity defense in federal court against certain claims, the presence of an Eleventh Amendment-barred claim does not present an obstacle to removal of the overall action, but requires only that the barred claims be dismissed. *Id.* at 392-93.

The presence of an insufficient monetary claim in a diversity case under *Zahn* is much like the presence of an Eleventh Amendment-barred claim in a federal question case

under *Schacht*: neither prohibits the assertion of "original jurisdiction" over an action that includes such claims. All that is required in either case is dismissal of the jurisdictionally improper claims. [2] And all that § 1367(a) did was to alter the *Zahn* rule, authorizing the court to take supplemental jurisdiction over insufficient claims, where previously it could not.

2. Petitioners further argue that interpreting § 1367 according to its plain meaning would necessarily lead to the "absurd" result of eliminating the complete diversity rule, because, they say, diverse plaintiffs could simply join nondiverse plaintiffs under Rule 20. Pet. Br. at 23. That argument rests on the same erroneous assumption that the amount-in-controversy rule has the same the jurisdictional effects in a diversity action as the complete diversity rule. As we have

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[2] The Court's opinion in *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), cited in *Schacht*, 524 U.S. at 388, 389, also suggests that the rule of complete diversity is a rule of original jurisdiction: "When a plaintiff sues more than one defendant in a diversity action, the plaintiff must meet the requirements of the diversity statute for *each* defendant or face dismissal." 490 U.S. at 829 (emphasis in original). The *Newman-Green* Court did approve dismissal of a dispensable nondiverse party (as opposed to dismissal of the entire action) when the party's nondiverse status is discovered late in the litigation, but the opinion still describes the presence of such a party as creating a "jurisdictional defect[]," for which dismissal is a "remedy." *Id.* at 833 n.7; *see also id.* at 836 (dismissal "correct[s] jurisdictional defects"); *id.* at 839 (Kennedy, J., dissenting) (effect of dismissal is to confer jurisdiction "retroactively"). The dismissal of nondiverse claims *Newman-Green* authorizes in the complete diversity context is thus very different from dismissal of monetarily insufficient claims *Zahn* authorizes in the amount-in-controversy context. Unlike *Newman-Green*'s treatment of the presence of a nondiverse party as an actual "jurisdictional defect" in the overall action (for which dismissal of the individual nondiverse parties is a "remedy"), *Zahn* and its antecedents make clear that the presence of a monetarily insufficient claim in a diversity case has no effect at all on the court's jurisdiction over the overall action. *See supra* at 11-12.

shown, it may well be the case that a court may *not* assume "original jurisdiction" in diversity within the meaning of § 1367(a) over a "civil action" when the claims of nondiverse parties are joined with those of diverse parties.[3] Because the complete diversity rule may be the kind of rule of original jurisdiction the amount-in-controversy rule clearly is not, it is not necessary to read the end of the complete diversity rule into the plain textual reading of § 1367.

But the ultimate effect of § 1367 on the rule of complete diversity is, in any event, beside the point here. Regardless of its meaning for complete diversity, the text of the statute is unambiguous with respect to the joinder of monetarily insufficient claims of unnamed plaintiffs in a class action with the sufficient claims of the named plaintiffs. "The language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical." *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998). And even if the plain meaning of the statute led to less-than-complete diversity in some cases, that would raise no constitutional difficulty warranting a departure from the straightforward textual reading: the requirement of complete diversity is purely statutory, and there is "no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as *any* two adverse parties are not co-citizens." *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) (emphasis added); *see Caterpillar, Inc. v. Lewis*, 519 U.S.

[3] This is the interpretation of § 1367 and complete diversity urged by James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. Pa. L. Rev. 109, 146 (1999). The petitioners cite this article in support of their view of the amount-in-controversy rule, Pet. Br. at 11 n.4, but, like petitioners, Pfander errs in assuming that the amount-in-controversy rule is the jurisdictional equivalent of the complete diversity rule in a class action diversity proceeding, *see* Pfander, *supra*, at 148.

61, 68 & n.3 (1996). But whatever may be its consequences for the rule of complete diversity – and those consequences, as we have seen, are not foreordained – all that is relevant here is that the text of § 1367 plainly confers supplemental jurisdiction on the monetarily insufficient claims of unnamed plaintiffs in a putative class action.

C

The previous sections have demonstrated that the plain text of the statute compels a clear and straightforward result here. Petitioners nevertheless resort to the legislative history in the hopes of discerning an intent of Congress that would trump the text of the statute. But that is not the function of legislative history; while this Court on occasion adverts to legislative history to clarify an ambiguous statute, the use of such history to redraft one that is unambiguous has never been countenanced. *See, e.g., Shannon v. United States*, 512 U.S. 573, 583 (1994). And even assuming legislative history might control over the statutory text where that history leaves an objective observer "fully convinced that every Member of the enacting Congress, as well as the President who signed the Act, intended a different result," *Conroy v. Aniskoff*, 507 U.S. 511, 518 n.12 (1993), this is hardly such a case.

Petitioners principally rely on a single footnote, attached to a single sentence, in a single committee report accompanying the 1990 Act. The footnote is simply a citation to *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921) (which held that the rule of complete diversity applies only to named plaintiffs in a class action) and to *Zahn*. And the sentence to which that footnote is attached states: "The section [§ 1367] is not intended to affect the *jurisdictional requirements* of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley* [*v. United States*, 490 U.S. 545 (1989)]." H.R. Rep. 101-

734, at 29 (1990) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875.

Though critical to petitioners' claim that the legislative history is "unmistakably clear," Pet. Br. at 25, this passage in fact does not admit of obvious interpretation. Petitioners read the passage, together with its footnote, as plainly saying that the statute was not intended to "overrule" *Zahn*, but that reading is not at all obvious from the words, nor is it even necessarily the best reading. What the sentence actually says is that the statute was not intended to set aside the "jurisdictional requirements" of § 1332, which in *both* the cited cases – *Zahn* and *Ben Hur* – had been understood as meaning that at least *some* of the plaintiffs must satisfy both predicates of the statute. And insofar as the phrase "jurisdictional requirements of . . . § 1332" may be taken as a reference to preservation of a court's *original* diversity jurisdiction, we have already explained why the *Zahn* rule is not about original jurisdiction at all. Thus, the legislative history snippet so key to petitioners' analysis can be read as simply confirming what the statutory text actually says: the statute preserves the rule, reaffirmed in *Ben Hur* and *Zahn*, that in a diversity case there must be some claim within the court's original diversity jurisdiction, before a court may exercise supplemental jurisdiction authority over transactionally related claims.

Thus, the passage on which petitioners primarily rely fails to establish for certain that even the author of that passage – not to mention a single member of Congress – clearly intended that § 1367 would not alter the result in a case like *Zahn*. There is, in fact, only one snippet from the legislative history that says anything precise about the result in *Zahn*: the initial report of the Federal Courts Study subcommittee, authored by subcommittee chairman Judge Posner, which explicitly proposed *rejecting* the rule in *Zahn*, and recommended statutory language that would accomplish that result.

See Report to the Federal Courts Study Committee of the Subcommittee on the Federal Courts and Their Relation to the States (Mar. 12, 1990), *reprinted in* Federal Courts Study Committee, 1 *Working Papers and Subcommittee Reports* 1, 561 n.33 (1990).[4] And that language, it turns out, was in all relevant ways identical to the statutory language ultimately enacted by Congress. *Compare id. with* 28 U.S.C. § 1367. Several law professors involved in the drafting process, on the other hand, apparently favored maintaining the *Zahn* rule. *See* Christopher M. Fairman, *Abdication to Academia: The Case of the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367*, 19 Seton Hall Legis. J. 157, 160 (1994). Notably, it does not appear that a single member of Congress was among those who engaged in the debate over the future of *Zahn*.

At the end of the day, about the only thing that is "clear" from the record of commentary, proposals, amendments, and counterproposals concerning § 1367 is that *Zahn* had its supporters and detractors among the judges and law professors who saw § 1367 through its various iterations. That says nothing at all, of course, about what *Congress* intended in enacting the statute. For that we must rely on the statute's language. And as to the meaning of that language, the one lesson we *can* learn from the legislative history is that Judge Posner's subcommittee believed that language essentially identical to what would become § 1367 would reverse the *Zahn* rule.

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[4] Petitioners incorrectly state that the full Committee "rejected" that proposal, Pet. Br. at 28; in fact, the full Committee's report did not say a word about *Zahn* or the effect of the recommended statutory language on the *Zahn* rule.

II. ALLOWING THE REMOVAL OF STATE COURT CLASS ACTIONS INVOLVING PARTIES WITH DIVERSE CITIZENSHIP IS A SENSIBLE POLICY RESULT

In addition to asserting that the plain textual reading of § 1367 leads to the "absurd" result of eliminating the complete diversity rule, *see supra* at 15-17, petitioners defend their construction of the statute on the ground that Congress could not possibly have intended to "expand" federal diversity jurisdiction over class actions such as the case at bar. In reality, the absurdity lies with petitioners' argument. Congress has been manifesting an increasingly heightened concern about state courts' handling of class actions. Indeed, that concern has now grown so acute that only several months ago, the House of Representatives passed legislation that would allow parties much broader latitude to remove state court class actions to federal court.[5] Recognizing that interstate class actions "deserve Federal court access because they typically affect more citizens, involve more money, and implicate more interstate commerce issues than any other type of lawsuit,"[6] that legislation expands federal jurisdiction over certain purported class actions if there is minimal diversity among the parties (including the unnamed putative class members), regardless of each claimant's amount in controversy.[7] If Congress is now passing laws granting even broader federal jurisdiction over class actions than what would be permitted by the plain meaning of § 1367, there is hardly a sound basis for nullifying that plain meaning on the

[5] H.R. 1875, 106th Cong. (1999). *See also* 145 Cong. Rec. H8594-95 (daily ed. Sept. 23, 1999) (floor vote).

[6] H.R. Rep. 106-320, at 4 (1999).

[7] Comparable legislation is pending in the Senate. *See* S. 353, 106th Cong. (1999).

ground that it is "absurd" to suggest that Congress could have intended such a result.

The powerful logic supporting the expansion of federal diversity jurisdiction over purported class actions is amply demonstrated by the records from multiple recent House and Senate Judiciary Committee hearings exploring the abuses of state court class actions and from the debates of this issue on the House floor. Those hearings and debates have focused on several long-standing problems:

First, there is concern that some state courts have become magnets for class actions, effectively declaring themselves the national tribunals for such cases. Even though state legislatures and courts have generally adopted the same principles for the certification of classes as have our federal courts,[8] some local county courts in some states have manifested a "laissez faire" attitude toward the question whether matters may be litigated on an aggregated basis. A report recently released by the RAND Institute for Civil Justice ("RAND/ICJ") confirmed what PLAC's corporate members already knew from their own experience: certain state courts have become fertile grounds for consumer and mass tort class actions because they are more likely to certify nationwide classes than are the federal courts or other state courts. Exec. Summary, RAND/ICJ, *Class Action Dilemmas* 7 (1999). Since nationwide class actions can, by definition, be filed in virtually any court of general jurisdiction in any of the 50 states, certain state courts have become the favorites of the plaintiffs' bar. *See Class Action Dilemmas*, *supra*, at

[8] Forty states have adopted the current Fed. R. Civ. P. 23 virtually verbatim. *See* H.R. Rep. 106-320, at 5 (1999). Two states do not permit class actions. *id.*, and the courts of the other eight states typically look to federal precedents for guidance on class certification issues, *see, e.g.*, *Vasquez v. Superior Court*, 484 P.2d 964, 976 (Cal. 1971) (in bank); *Testa v. City of Providence*, 572 A.2d 1336, 1338 n.2 (R.I 1990); *Gardner v. Newsome Chevrolet-Buick, Inc.*, 404 S.E.2d 200, 201 (S.C. 1991).

7; *Hearing Before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary on H.R. 3789* ["*H.R. 3789 Subcommittee Hearing*"], 105th Cong. 8 (June 18, 1998) (testimony of Sheila Birnbaum, Esq.) ("Plaintiff class action lawyers will typically seek out 'select' state court judges who quickly certify class actions with seemingly little or no consideration to the appropriateness of class certification under the rules or the due process rights of the defendant and absent class members."). As the RAND/ICJ report concluded, "class action attorneys 'shop' for judges who are favorable to class actions," and such attorneys "find them most often in state courts." *Class Action Dilemmas*, *supra*, at 7.[9]

Second, there is concern that the state courts that are class action magnets are "speed traps" for defendants. The expanded use of class actions in certain state courts would be little cause for concern if those courts generally treated certification of classes in accordance with the minimal criteria specified in Rule 23 of the Federal Rule of Civil Procedure. The federal rule enables plaintiffs to litigate and dispose of multitudinous claims simultaneously, but it also requires observance of specific additional protections to ensure that simultaneous litigation of multiple claims does not impair the defendant's due process right to present an adequate defense

[9] In many states, county courts can take this approach without substantial fear of reversal either (a) because class certification determinations are not subject to interlocutory appellate review, *see, e.g., Eaton v. Unified Sch. Dist. No. 1*, 595 P.2d 183, 186 (Ariz. 1979); *Knowles v. Standard Sav. & Loan Ass'n*, 261 S.E.2d 49 (S.C. 1979); or (b) because the state's appellate courts afford the trial courts broad discretion in making class certification determinations, *see, e.g., Tuley v. Kansas City Power & Light Co.*, 843 P.2d 248, 256 (Kan. 1992) (trial court's class certification determination may be reversed only where it was "arbitrary, fanciful, or unreasonable"); *Carson v. Weiss*, 972 S.W.2d 933, 934 (Ark. 1998) (interlocutory appeal of class action determination subject to review only for "abuse of discretion").

against each individual claim. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) ("[The] Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged."). For example, Rule 23 requires that claims of the representative parties be "typical" of the claims of every member of the class, Fed. R. Civ. P. 23(a), and that common issues of law "predominate" over the any legal questions affecting only individual class members, *id.* 23(b)(3). Those requirements ensure that a defendant forced to deal with hundreds or thousands of plaintiffs at once is in fact only defending against a single, narrowly presented legal situation. Under those circumstances, there is less risk of prejudicing the defendant's right to fully defend against claims brought by numerous plaintiffs.

The state courts that manifest a "laissez-faire" attitude toward class certification typically do not take seriously the due process foundations of the requirement that class actions present legal and factual issues that are truly common to the entire class. *See H.R. 3789 Subcommittee Hearing*, *supra*, at 22 (attached March 5, 1998 testimony of John W. Martin, Jr.) ("many local courts are willing to certify for class action treatment cases that do not comport with the basic class action requirements. . . . Indeed, some state courts actually have certified proposed classes identical to ones rejected outright by federal courts [on due process grounds]."). For example, the congressional hearings revealed a pattern among some state courts for certifying classes on the same day the complaint was filed before the defendant was even served and allowed to oppose. *Id.* The record also indentifies one state court judge who certified almost as many cases for class treatment during 1996-1997 as were certified during 1997 by all approximately 900 sitting federal district judges.[10] This abuse of the class action device has serious

[10] *See Mass Torts and Class Actions: Hearing before the Subcomm. on Intellectual Property and the Courts of the House Comm. on the Judi-*

consequences. The inappropriate certification of a class is hardly a minor pretrial ruling error. The issuance of a class certification order immeasurably alters the nature of the litigation, most particularly by dramatically increasing the risks to which the defendant is exposed, and, consequently, the incentives for settling even the most nonmeritorious actions. As was observed in recent House floor debates,

> Today, an attorney can devise a theoretical case, write it as a class action, and argue that he is pursuing the claim on behalf of millions of people, none of [whom] solicited that attorney's assistance. Using this practice, hundreds of frivolous lawsuits are filed in favorable State courts and used as high-stakes, court-endorsed blackmail devices against companies that usually settle rather than face a long and arduous court battle.[11]

Third, there is concern that this "laissez-faire" environment in certain state courts has spawned a "flood of class-action litigation."[12] As former Attorney General Griffin Bell has testified,

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ciary, 105th Cong. (March 5, 1998) (statement of Dr. John Hendricks) (available at http://www.house.gov/judiciary/41164.htm).

[11] 145 Cong. Rec. H8564 (daily ed. Sept. 23, 1999) (statement of Rep. Goodlatte). As Judge Posner has observed, a class certification order "often, perhaps typically, inflict[s] irreparable injury on the defendants." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995).

[12] *H.R. 1875, The Interstate Class Action Jurisdiction Act of 1999, Hearing before the House Comm. on the Judiciary* (July 21, 1999) (statement of Prof. E. Donald Elliott (Yale Law School)) (available at http://www.house.gov/judiciary/elli0721.htm) (citing D. Hensler, *Preliminary Report of the RAND Study of Class Action Litigation* 15 (May 1, 1997) (observing a "doubling or tripling of the number of putative class actions" heavily "concentrated in the state courts")).

> class actions are now being used by attorneys to build lawsuits where none would otherwise exist. Please do not take seriously any suggestion that class actions normally originate when an injured party seeks out an attorney and asks for assistance in obtaining a remedy. Attorneys usually "develop" the concept for a claim and then search for a plaintiff to fit the mold.[13]

Fourth, concern has been expressed that in many state court class actions, consumer class members are merely pawns in what are really business ventures masquerading as lawsuits. In recent congressional hearings, witnesses have urged that state court class actions primarily benefit class counsel, not the class members.[14] For example, former Attorney General Richard Thornburgh observed that "[t]he most alarming aspect of recent class-action law is the utter disproportion between the[] vast fortunes reaped by the individual trial lawyers, and the injury claimed and the remedial actions achieved on behalf of individual plaintiffs."[15] Those

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[13] *H.R. 1875, The Interstate Class Action Jurisdiction Act of 1999, Hearing before the House Comm. on the Judiciary* (July 21, 1999) (statement of Hon. Griffin Bell) (available at http://www.house.gov/judiciary/bell0721.htm).

[14] *Class Action Lawsuits: Examining Victim Compensation and Attorneys' Fees, Hearing before the Subcomm. on Administrative Oversight and the Court of the Senate Judiciary Comm.*, 104th Cong. (Oct. 30, 1997) (statement of Sen. Herb Kohl); *S. 353: "The Class Action Fairness Act of 1999," Hearing before the Subcomm. on Administrative Oversight and the Courts of the Senate Judiciary Comm.*, 106th Cong. (May 4, 1999) (statement of Sen. Herb Kohl); *S. 353: "The Class Action Fairness Act of 1999," Hearing before the Subcomm. on Administrative Oversight and the Courts of the Senate Judiciary Comm.*, 106th Cong. (May 4, 1999) (statement of John P. Frank).

[15] *Mass Torts and Class Actions: Hearing before the Subcomm. on Intellectual Property and the Courts of the House Comm. on the Judiciary*, 105th Cong. (March 9, 1998) (statement of Hon. Richard Thornburgh) (available at http://www.house.gov/judiciary/41156.htm).

charges are bolstered by case reviews in the RAND study revealing that in non-personal injury class actions filed in state courts, class counsel often (if not typically) receive more dollars from settlements or verdicts than the thousands of persons in the class *combined*. *See Class Action Dilemmas, supra,* at 23.

Fifth, there is concern that state court class actions have created a serious "false federalism" problem. As former Acting Solicitor General Walter E. Dellinger testified before the House Judiciary Committee,

> many state courts faced with interstate class actions . . . have undertaken to dictate the substantive laws of other states by applying their own laws to all other states, which results essentially in a breach of federalism principles. . . . And because the state court decision has binding effect everywhere . . . the other states . . . have no way of revisiting the interpretation of their own laws.[16]

For example, in a nationwide class action, the Williamson County (Illinois) Circuit Court recently applied Illinois law to the question whether it is fraudulent for an auto insurer to use aftermarket parts (instead of original manufacturer's parts) in repairing accident-damaged vehicles. The attorneys general and insurance commissioners of other states protested that choice-of-law determination vigorously, noting that their respective states' laws (which should have been applied instead of Illinois law) *encouraged* the use of aftermarket parts to reduce repair costs.[17] Nevertheless, finding

[16] *H.R. 1875, The Interstate Class Action Jurisdiction Act of 1999, Hearing before the House Comm. on the Judiciary* (July 21, 1999) (statement of Hon. Walter E. Dellinger) ("Dellinger Testimony") (available at http://www.house.gov/judiciary/dell0721.htm).

[17] *See* Matthew L. Wald, *Suit Against Auto Insurer Could Affect Nearly All Drivers*, N.Y. Times, Sept. 27, 1998, at 29.

the practice fraudulent under Illinois law, the jury and court awarded $1.2 billion to the nationwide class.[18] Unsurprisingly, insurers nationwide immediately stopped using aftermarket parts.[19] Thus, a county court judge elected by the approximately 60,000 residents of a single Illinois community effectively countermanded the policies adopted by the elected officials of other jurisdictions.[20]

Finally, many witnesses at the recent congressional hearings have expressed the view that the pending class action crisis is attributable to the fact that the federal courts' doors are closed to most class actions not involving federal questions. As a leading civil procedure treatise has noted, the "traditional principles" regarding federal diversity jurisdiction over class actions "have evolved haphazardly and with little reasoning" and "serve no apparent policy."[21] Indeed, as noted during a recent House floor debate, the diversity jurisdiction statutes

> were originally enacted years ago, well before the modern class action arose, and they now lead to perverse results. For example, under current law, a citizen of one State may bring in Federal court a simple $75,001 slip-and-fall claim against a party from another State. However, if a class of 25 million product owners, each having a claim of $10,000 living in all 50 states, brings claims collectively worth $250 bil-

[18] Roger Manor, *State Farm Liability Jumps to $1.1 Billion*, Chicago Sun-Times, Oct. 9, 1999, at 1; Davan Majaraj, *Judge Hits State Farm in Parts Case*, L.A. Times, Oct. 9, 1999, at C-1.

[19] *See, e.g., Insurance Company to Halt Use of Cheaper Auto Parts*, Fort Worth Star-Telegram, Nov. 7, 1999, at 13.

[20] Other examples are cited in the Dellinger Testimony, *supra* note 16.

[21] 14B Charles A. Wright *et al.*, Federal Practice and Procedure § 3704, at 127 (3d ed. 1998).

> lion against the manufacturer, the lawsuit cannot be heard in Federal court.[22]

Echoing that view in recently concluding that a large class action must be remanded to an Alabama state court, the United States Court of Appeals for the Eleventh Circuit *apologized* to the defendant, noting that the state court to which the case was being remanded "has on occasion produced gigantic awards against corporate out-of-state defendants." *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 797 (11th Cir. 1999). As the court observed, "one would think that this case is exactly what those who espouse the historical justification for [federal diversity jurisdiction] would have had in mind," *id.*, but the current federal jurisdiction rules "do[] not accommodate the reality of modern class litigation," *id.* at 799 (Nangle, D.J., concurring).[23]

* * * *

In sum, contrary to petitioners' contentions, the result that the text of § 1367 commands is in no way an "absurd" policy that could not have been intended by the members of Congress. As noted above, the House of Representatives recently passed legislation that would expand federal jurisdiction over purported class actions well beyond what is permitted by the plain meaning of § 1367.[24] And as long in-

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[22] 145 Cong. Rec. H8569 (daily ed. Sept. 23, 1999) (statement of Rep. Goodlatte).

[23] Similarly, in *In re Prudential Ins. Co. of America Sales Practices Litig.*, 148 F.3d 283, 305 (3d Cir. 1998) (Scirica, J.), the Third Circuit observed that "national (interstate) class actions are the paradigm for federal diversity jurisdiction," yet most such "class actions may be beyond the reach of the federal courts" under the current jurisdictional statutes.

[24] H.R. 1875, 106th Cong. (1999). *See* 145 Cong Rec. H8594-95 (daily ed. Sept. 23, 1999) (floor vote). Comparable legislation is pending in the Senate. S. 353, 106th Cong. (1999).

terpreted by this Court, the diversity jurisdiction statute already allows an out-of-state defendant to remove a putative class action filed by diverse named plaintiffs even if the complete diversity requirement is not satisfied with respect to the unnamed class members. *See Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921). Section 1367 merely equalizes that rule for the amount-in-controversy requirement, sensibly allowing defendants to remove to federal court the kinds of putative multistate class actions now filed so frequently in certain state courts – actions that, while alleging individual claims of less than the diversity statute minimum, on aggregate expose the defendant to millions of dollars in potential liability.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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IN THE
Supreme Court of the United States

ROBIN FREE and RENEE FREE,

Petitioners,

v.

ABBOTT LABORATORIES, BRISTOL-MYERS SQUIBB COMPANY and MEAD-JOHNSON & COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE SECURITIES INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The Securities Industry Association ("SIA") represents the interests of more than 740 securities firms, including investment banks, broker-dealers, and mutual-fund companies, located throughout the United States.[1] Collectively, the SIA's members account for approximately ninety percent, or $270 billion, of securities firms' annual revenues, employ over 600,000 individuals, and directly or indirectly manage the accounts of tens of millions of investors. By virtue of their involvement in all phases of corporate and public finance, the SIA's members and their affiliates are each year subject to hundreds of class-action lawsuits in courts around the country.

The SIA's members thus take a keen interest in the rules governing removal of national class actions from state to federal court. Specifically, the SIA strongly supports the application of federal jurisdiction to large and complex lawsuits of national consequence, particularly class actions (like this one) brought in multiple states, and class actions brought in a single state but encompassing a national class. In these instances, a federal forum offers the welcome prospect of fair, uniform, efficient, and effective administration of justice.

Recognizing these values, Congress passed the Securities Litigation Uniform Standards Act of 1998 (the "Uniform

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1. The SIA and its counsel authored this brief in its entirety, and no person or entity, other than the SIA, its members, and its counsel, made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court.

Standards Act"), Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.). This Act, which furthered the objectives of the Private Securities Litigation Reform Act of 1995 (the "Reform Act"), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.), makes certain class actions removable to federal court, and, among other things, enables parties to consolidate and coordinate in federal court duplicative, parallel actions that would otherwise proceed independently in multiple court systems. The Uniform Standards Act substantially brought to a close plaintiffs' attempts to avoid the Reform Act's provisions by filing what are in effect federal securities class actions in state court under analogous state laws.

The SIA believes that its members' experience with the Uniform Standards Act and with class-action securities litigation provides a useful context in which to examine the soundness of applying 28 U.S.C. § 1367 to authorize federal courts to exercise supplemental jurisdiction over the claims of absent class members where there is original jurisdiction over the named plaintiffs' claims. Like the Uniform Standards Act, Section 1367 enables parties to manage the risk of inconsistent adjudications, and enables parties to reduce the costs, burdens, and complications inherent in maintaining multiple, related civil actions in more than one judicial setting. Like the Uniform Standards Act, Section 1367 also stems the tide of national class actions being brought in state, rather than federal, court expressly to avoid the application of the more rigorous federal standards of class certification. In short, like the Uniform Standards Act, Section 1367 measurably promotes state and federal judicial economy and improves the administration of justice. In cases of national consequence, these goals provide particularly

compelling justification for Section's 1367's grant of supplemental jurisdiction.

SUMMARY OF ARGUMENT

Section 1367 unambiguously authorizes federal courts to exercise supplemental jurisdiction over the claims of absent class members where there is original jurisdiction over the named plaintiffs' claims. Dissatisfied with this result, petitioners label it "absurd." They claim that Congress could not have intended such a result, and thus they invite this Court to canvass legislative history for a more favorable interpretation. But this Court need not resort to such measures. As the SIA's experience with the Uniform Standards Act demonstrates, the rule set forth in Section 1367 is not absurd. Rather, like the Uniform Standards Act, Section 1367 is a sensible, reasonable, and appropriate legislative response to the problems and issues presented by large and complex class action lawsuits brought in multiple states, or brought in single states but encompassing a national class. Accordingly, the decision below should be affirmed.

ARGUMENT

As respondents' brief amply demonstrates, Section 1367 unambiguously authorizes federal courts to exercise supplemental jurisdiction over the claims of absent class members where there is original jurisdiction over the named plaintiffs' claims. As respondents' brief also shows, the legislative history of Section 1367 is not out of harmony with its plain language and effect. The SIA will therefore not burden the Court with its own analysis of the statute or its legislative history. Rather, by analogy to the recent example of the Uniform Standards Act, we will show that

Section 1367 constitutes sensible, reasonable, and appropriate legislation and that there is no basis for this Court to conclude, as petitioners argue, that Section 1367 as applied by the court below is somehow "absurd."

I. SECTION 1367, LIKE THE UNIFORM STANDARDS ACT, PROMOTES UNIFORMITY, EFFICIENCY, AND THE EFFECTIVE ADMINISTRATION OF JUSTICE IN CASES OF NATIONAL CONSEQUENCE.

As this action epitomizes and commentators confirm, in recent years there has been a significant increase in the filing of multiple, duplicative actions in several states to obtain settlement leverage over class-action defendants, to burden them with increased litigation expenses, and to minimize the consequences of an adverse ruling. *See* Deborah R. Hensler *et al.*, RAND Institute for Civil Justice, *Class Action Dilemmas: Pursuing Public Goals for Private Gain (Executive Summary)* 9-10 (1999). Commentators likewise have observed an increase in the filing of nationwide class actions in state rather than federal court to pursue claims, often against out-of-state defendants, under more forgiving procedural requirements and before jurists who may lack the experience, the administrative apparatus, and the life tenure necessary to handle large and complex cases fairly, efficiently, and effectively. *See Statement of Stephen G. Morrison Before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. on the Judiciary*, S. 353: The Class Action Fairness Act of 1999, at 2 (May 4, 1999) (available at <http://www.senate.gov/~judiciary/5499sgm.htm>) [hereinafter *Morrison Statement*].

Justice unmistakably suffers as a result: with less predictable jurists, looser procedural safeguards, and higher

stakes, the pressure on defendants to settle is intense and can be entirely out of proportion to the merits of the underlying claim. *See Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (relating the pressures on class-action defendants to settle); *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (same); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (same), *cert. denied*, 516 U.S. 867 (1995). Even where claims lack any merit, many defendants are forced to conclude that their only acceptable litigation option, as a business matter, is simply to give in and pay up.

Section 1367 addresses such concerns. In federal court, both the parties and the judiciary may more easily manage large and complex cases. *See, e.g.*, Richard B. Schmitt, *Justice RFD: Big Suits Land in Rural Courts*, Wall St. J., Oct. 10, 1996, at B1, B9 (noting that large, complex cases can overwhelm small, rural courts). Moreover, where it is appropriate, similar and related class actions brought in different states can be consolidated and coordinated, thereby reducing the burdens on all involved, including not only defendants but also unnamed class members, and minimizing or avoiding inconsistent rulings among actions. *See* 28 U.S.C. § 1407 (1994) (permitting interdistrict transfers for coordinated or consolidated proceedings to promote convenience, justice, and efficiencies). And where claims arise under the state law of multiple jurisdictions, federal judges are more experienced in the application of the laws of different states, and federal courts are better equipped to handle the complex management and administrative burdens associated with such actions. *See Morrison Statement*, *supra*, at 5.

The Uniform Standards Act addressed similar concerns. Following the passage of the Reform Act, the number of securities class actions filed in state court increased dramatically. These filings, which were essentially federal securities class actions brought under state law, were made in state rather than federal court to avoid the application of the procedural and substantive safeguards contained in the Reform Act. *See* Uniform Standards Act § 2, 15 U.S.C. § 78a (Supp. 1998) ("[S]ince the enactment of [the Reform Act], . . . a number of securities class action lawsuits have shifted from Federal to State Courts . . . prevent[ing] that Act from fully achieving its objectives."); Michael A. Perino, *Fraud and Federalism: Preempting Private State Securities Fraud Causes of Action*, 50 Stan. L. Rev. 273, 338 n.157 (1998) (calculating that state-court securities class-action filings jumped by over 250% following the Reform Act's enactment).

And a further problem arose: many state securities class actions were brought *in addition to* functionally identical federal class actions. The purpose of many of these duplicative filings was to avoid the Reform Act's discovery stay during the pendency of a motion to dismiss and to obtain discovery in state court to aid their federal-court causes. *See* Office of the General Counsel, U.S. Securities and Exchange Commission, *Report to the President and the Congress on the First Year of Practice Under the Private Securities Litigation Reform Act of 1995*, at 4 (1997) ("[M]any of the state [securities-fraud] cases are filed parallel to a federal court case in an apparent attempt to avoid provisions of the Reform Act."). [2] As a result, before the Uniform Standards

2. Similarly, as plaintiffs' law firms vied with each other for the opportunity to collect an award of attorneys' fees, multiple, (Cont'd)

Act, parties ran a significant risk of inconsistent rulings in different courts, and not coincidentally, duplicative, less predictable litigation increased the risks and costs to class-action defendants.

By the Uniform Standards Act, Congress responded and closed the state-court loophole that permitted such tactics. Under the Act, defendants may now remove most securities class actions to federal court, and state securities-fraud class-action claims are now largely preempted. *See* Uniform Securities Act § 101(b)(1)(B)(1)-(2), 15 U.S.C. § 78bb(f)(1)-(2) (Supp. 1998). In a federal forum, cases may be more effectively managed and, where appropriate, consolidated and coordinated with similar federal actions pending before other federal district courts. *See* 28 U.S.C. § 1407 (1994).

Section 1367 achieves these same worthwhile goals for class actions outside the securities arena, enabling many more class actions to be adjudicated and administrated more fairly and effectively. By permitting such class actions to be removed to federal court, Section 1367 simply allows defendants in such class actions to opt for a federal forum, and the ability to have an action of potentially national scope and scale heard in a federal forum, with the attendant advantages of a judiciary that is familiar with the administration of large and complex multiparty matters, that is experienced with applying the law of multiple jurisdictions,

(Cont'd)
duplicative state class action lawsuits appeared in various states, forcing duplicative litigation on several fronts. *See* Richard A. Rosen, *The Statutory Safe Harbor for Forward-Looking Statements After Two and a Half Years: Has It Changed the Law? Has It Achieved What Congress Intended?*, 76 Wash. U.L.Q. 645, 672 (1998).

and that will apply federal standards of procedure and due process. And Section 1367 does so without preempting or otherwise affecting the availability of any class-action remedies. Surely there is nothing "absurd" about such a result.

II. Section 1367, Like the Uniform Standards Act, Stems the Tide of National Class Actions Being Filed in State Courts To Avoid the Application of Federal Standards.

Class-action plaintiffs have also turned to state courts specifically to avoid the application of the more stringent class certification standards of the Federal Rules of Civil Procedure. *See* Hensler *et al.*, *supra*, at 15; *Morrison Statement*, *supra*, at 2.[3] As a result, class actions that would not have been certified in federal court — or for that matter, in many state courts — are often certified, sometimes on an *ex parte* basis. *See Testimony of E. Donald Elliott Before the Subcomm. on Administrative Oversight and the Courts*

3. As the *Wall Street Journal* reported, some members of the plaintiffs' bar purposefully seek out the most permissive courts and judges:

> [P]laintiffs' lawyers, who were awarded millions of dollars in fees, have nothing but praise for the judge [before whom they just succeeded.] "I think he is probably now the leading class-action judge in the South," says Gordon Ball, a Knoxville, Tenn. lawyer and former classmate [of the judge] who recommended bringing the case in his court. "We probably will file another class action down there at some point. It was a very positive experience."

See Schmitt, *supra*, at B9.

of the Senate Comm. on the Judiciary, S. 353: The Class Action Fairness Act of 1999, at 6 (May 4, 1999) (available at <http://www.senate.gov/~judiciary/5499ede.htm>); *Morrison Statement*, *supra*, at 3 (describing "drive-by class certification" whereby a class is certified without giving notice to defendants and, in some instances, before defendants are served with the complaint). In fact, as many such class actions encompass nationwide classes, these state courts, often in small, rural jurisdictions far from the centers of commercial activity that they will affect, usurp and exercise a sort of nationwide jurisdiction, applying the law of any or all of the fifty states and adjudicating claims thereunder. *See Morrison Statement*, *supra*, at 5.

Section 1367 eliminates much of this end run around the Federal Rules of Civil Procedure and the federal judiciary. The Uniform Standards Act effectively addressed a similar situation and cured the problem of end runs around the procedural safeguards and substantive requirements of the Reform Act. Under the Uniform Standards Act, securities class-action plaintiffs may no longer avoid, and thereby undermine, the reforms enacted specifically to curb their abuses. *See* Uniform Standards Act § 2(1), 15 U.S.C. § 78a (Supp. 1998). As interpreted by the Fifth and Seventh Circuits, Section 1367 likewise eliminates abuses by class-action plaintiffs. Once removed to federal court, class-action plaintiffs must comply with the procedures and safeguards afforded by Federal Rules of Civil Procedure and adhere to constitutional requirements of due process. Here again, the lesson of the Uniform Standards Act is clear: blocking this end run is not an "absurd" result.

III. LIMITING SECTION 1367 AS PETITIONERS URGE WOULD ADVERSELY IMPACT CASES OF NATIONAL CONSEQUENCE.

Limiting Section 1367 as petitioners urge would only encourage class-action plaintiffs to file, as they have here, multiple, duplicative actions in several state courts, or to file nationwide class actions in state courts to avoid federal law. Either result would severely impede the fair and efficient administration of justice and, as other *amici curiae* have extensively catalogued, disadvantage all — particularly defendants in such class actions — to the sole benefit of the plaintiffs' bar. *See Morrison Statement*, *supra*, at 2-5; Schmitt, *supra*, at B9. This Court should not disregard the plain terms of Section 1367 in order to countenance such practices. This Court should thus affirm the Fifth Circuit's interpretation of Section 1367 to permit supplemental jurisdiction over absent class members where there is original jurisdiction over named class-action plaintiffs.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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